Introduction

Timothy S. Huebner

If you have been reading closely over the years, you have noticed that "variety" is one of the consistent themes of these pages. The issue you hold in your hands may be near the top of the list when it comes to the range of topics included. Consider that this issue contains articles about the following: a relationship, a house, a page, and a doctrine.

Gerard N. Magliocca starts us off with a superb exploration of the oft-misunderstood relationship between Justice Bushrod Washington and Chief Justice John Marshall. Washington, of course, was the nephew of the first president and one of John Adams' appointments to the Court. And he was also, in Magliocca's telling, Marshall's closest ally on the Supreme Court. In contrast to those who have portrayed Washington as "slow thinking" or insignificant, Magliocca shows the critical role that Washington played during the Marshall era. The piece also offers a preview of Magliocca's forthcoming biography of Bushrod Washington. Magliocca is Samuel R. Rosen Professor at Indiana University's Robert H. McKinney School of Law.

The DACOR Bacon House, a 200-year-old residence in the northwest quadrant of D.C. originally built by Tench Ringgold, the U.S. Marshal for the District of Columbia, stands out for its numerous connections with the Court and its members. Terence Walz, an independent historian, has expertly researched this storied home. According to his findings, the home hosted conference deliberations, served as a boarding house for members of the Marshall Court, and witnessed a variety of social gatherings attended by the justices. It is likely that most of the justices who served between 1800 and 1950, in Walz's words, "either slept, dined, deliberated cases, or made merry" at the house.

The hiring of the first Black page, Charles Vernon Bush, made news in 1954, at the same moment that the Court issued its landmark ruling in *Brown v. Board of Education*. Todd C. Peppers, Fowler Chair in Public Affairs at Roanoke College and visiting professor of law at the Washington and Lee School of Law, tells the inspiring story of how Chief Justice Earl Warren hired the 14-year-old page, thus integrating the Capitol Page School, where Congressional and Supreme Court pages attended high school. Warren's gesture, Peppers tell us, was a small step forward on the path toward desegregation.

The "political questions" doctrine, which originated in the 19th century, long

DOI: 10.1111/jsch.12291

served as a way for the Court to decline to hear non-justiciable matters that it deemed more appropriately left to the political branches. *Powell v. McCormack* seemed to raise a classic "political question," for it pertained to whether the House of Representatives possessed the power to unseat a duty elected member of Congress, Adam Clayton Powell of New York. The Court could easily have passed on hearing the case, but instead, according to Olivia O'Hea, Warren and his colleagues wanted to make a statement in support of Powell, an African-American champion of civil rights. They willingly avoided the political questions doctrine and chose instead to assert judicial power to remedy the discrimination. O'Hea wrote the article as a third-year J.D. Candidate at Georgetown University Law Center.

The variety and quality of articles published in the *Journal of Supreme Court History* is a credit to the team we have recently assembled. Michael Ross, a distinguished constitutional historian at the University of Maryland, has assumed the position of Associate Editor. You probably already know Mike's name. He is author of two prize-winning books on the Reconstruction Era and has twice delivered Leon Silverman Lectures at the Court. For the past several months, Mike has been reading essays and providing important editorial advice. I am deeply grateful for his willingness to serve in this important role. Mark Killenbeck, another familiar name to readers of the *Journal of Supreme Court History*, has assumed the role of Consulting Editor. Mark is Wylie H. Davis Distinguished Professor of Law at the University of Arkansas School of Law. Finally, we are pleased to have added a handful of new members of the Board of Editors: Laura F. Edwards, Class of 1921 Bicentennial Professor in the History of American Law and Liberty and Professor of History at Princeton; Helen J. Knowles, Associate Professor of Political Science at Oswego, State University of New York; and Brad Snyder, Professor of Law at Georgetown Law School. Meanwhile, Paul Kens, Professor of Political Science at Texas State University, and Donald Grier Stephenson. Jr., Charles A. Dana Professor of Government, Emeritus at Franklin & Marshall College, continue to cover book reviews for us. Paul has a featured review in this issue, while Grier has written another edition of the "Judicial Bookshelf." Finally, and most important of all, Clare Cushman continues to keep us all organized as she runs the operation from her office at the Supreme Court Historical Society in Washington, D.C.

As you explore the variety of articles in this issue of the *Journal of Supreme Court History*, I hope you will be as appreciative of the labors of these folks as I am. Thanks for reading.

"Commonly Estimated as One Judge": Bushrod Washington and the Marshall Court

Gerard N. Magliocca

In 1822, Justice William Johnson gave Thomas Jefferson a brief description of his colleagues from his early years on the Supreme Court.[1] After dismissing almost all of them as "incompetent," "slow," or unable to "think or write," Justice Johnson told Jefferson that Chief Justice John Marshall and Justice Bushrod Washington "are commonly estimated as one judge."[2] One way of understanding Johnson's comment is that he thought that Justice Washington simply followed Chief Justice Marshall's lead, which is consistent with the idea that Marshall dominated his Supreme Court unlike any previous or subsequent Chief Justice. In researching my forthcoming biography of Bushrod Washington, I instead reached the conclusion that Justice Johnson called Washington and Marshall "one judge" because they were close collaborators.[3] Indeed, the Marshall Court is best understood as a partnership created by these two remarkable Virginians.

My claim challenges three cliches about the Marshall Court. The first is that Justice Washington was, in the words of Albert Beveridge, "slow-thinking" and dimwitted.[4] The second is that Associate Justice Joseph Story was Chief Justice Marshall's principal ally during Story's entire tenure on the Court.[5] While Story was an important member of the Marshall Court and was the Chief Justice's right-hand-man after Justice Washington's death in 1829, he was not the linchpin of that institution while Washington was on the bench. The third is that Chief Justice Marshall alone was the Marshall Court. Nobody thinks Earl Warren did everything on the Warren Court. Instead, we recognize that Chief Justice Warren worked with many other talented colleagues to fashion the jurisprudence of that era.[6] The same is true for John Marshall, and his alter ego was Bushrod Washington.

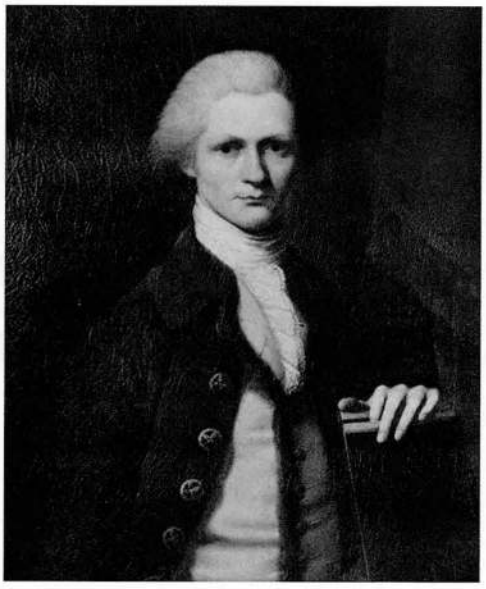
DOI: 10.1111/jsch.12284

Building Trust

Washington and Marshall's working relationship began well before they reached the Supreme Court. They first met in 1780 at the College of William and Mary, where they attended Professor George Wythe's law lectures and engaged in debates as members of Phi Beta Kappa.[7] In 1787, they were reunited as members of the Virginia House of Burgesses when Washington was elected to the legislature.[8] A year later, they both were chosen as delegates to Virginia's ratifying convention for the Constitution, where they strongly supported ratification.[9] But Washington and Marshall did not become close until Washington moved his legal practice to Richmond in 1792. Soon thereafter they were frequently arguing cases as a team or against each other in the Virginia Court of Appeals (Virginia's highest court).[10] They also served together on the Richmond City Council from 1794 to 1795, including a committee about local police reform.[11] When Marshall returned from his diplomatic mission in France now known of the "XYZ Affair," Washington welcomed him home with a rousing speech at a celebration in Alexandria in which he said: "When future generations peruse the history of America, they will find the name of Marshall on its sacred page as one of the brightest ornaments of the age in which he lived."[12]

On a personal level, Washington and Marshall were drawn together by common ideas and experiences. They both served in the Revolutionary War.[13] They were staunch Federalists who believed in national power and in protecting vested property rights from the encroachments of state legislatures. They both owned and sold many enslaved people.[14] And while they were each happily married, their wives suffered bouts of mental illness that often left both men as caretakers.[15]

Most important of all, they were both awed by and earned the confidence of George Washington. In Bushrod's case, this trust stemmed from a family connection, as he was



In 1783, at age 21, Bushrod Washington commissioned Henry Benbridge to paint this portrait as a gift for his mother, Hannah Bushrod Washington. He would be appointed to the Supreme Court in 1799 at the relatively young age of 37.

the eldest son of George's favorite younger brother Jack.[16] In Marshall's case, the bond stemmed from his years of military service under General Washington's command. In 1798, the General invited both men to Mount Vernon and demonstrated his faith in them by twisting their arms until they agreed to run for the House of Representatives in the upcoming midterm elections.[17] When George died, he bequeathed Mount Vernon and his personal papers to his nephew.[18] Bushrod promptly invited Marshall to write George's official biography and was the Chief Justice's editor on that project for many years.[19] They also jointly advised Martha Washington on issues related to her husband's estate after his death.[20]

Washington and Marshall were widely acknowledged as two of the best lawyers in Virginia when Justice James Wilson died in 1798. President John Adams decided that Justice Wilson's seat should go to

a Virginian, as that critical state was not represented on the Supreme Court. The President was given two names—John Marshall and Bushrod Washington.[21] Attorney General Thomas Pickering told the president that if "Marshall should decline. Mr. Washington has decidedly a superior claim to any other gentleman there of the profession."[22] Marshall did decline but told the attorney general that Washington would say yes and that "a more proper person could not be named."[23] Washington accepted the nomination, withdrew from his congressional campaign, and was confirmed by the Senate. When the c-justiceship became available a few years later, Marshall said yes to President Adams and joined Washington on the Bench.

The surviving correspondence between Washington and Marshall is written in a tone of mutual respect. In this era, the justices spent most of the year as circuit judges conducting trials and hearing appeals in designated parts of the country. When Washington and Marshall heard novel cases on their respective circuits, they kept each other informed and asked each other for help.[24] In one letter, Marshall thanked Washington for his views "in the case on which I consulted you. I have from the first thought [the issue] doubtful but shall decide it in conformity with your opinion."[25] When Washington asked Marshall for his insights on a constitutional question, the Chief Justice obliged but concluded that "your own judgment, you having heard the argument, is much more to be relied on than mine."[26] This is the language of equals, not the instructions rather of a leader to a follower.

Likewise, Marshall and Bushrod worked hand in glove on George Washington's biography. Washington handled all of the business arrangements for publication and sometimes made research requests on Marshall's behalf, including one to Alexander Hamilton.[27] Throughout the writing process, Marshall eagerly sought Washington's input, stating at one point:

> You mistake me very much if you think I rank the corrections of a friend with the bitter sarcasms of a foe, or that I should feel either wounded or chagrined at my inattentions and inaccuracies being pointed out by another. I know there are many and great defects in the composition.[28]

Washington later told the publisher that he "went to Richmond and continued with Mr. Marshall until we went through the reading and correcting of the third volume. I have just finished a second reading of it for the purpose of making a table of contents."[29] One cannot help but wonder if this was the same approach that Marshall and Washington used for writing some opinions, but there is no way to know because none of Marshall's Supreme Court opinion drafts survive.[30]

Creating a New Culture

To understand how Washington and Marshall's professional relationship carried over into their work on the Supreme Court, the best place to start is with two customs that made the Marshall Court distinctive. One was speaking as often as possible through a single opinion written by the Chief Justice. Washington and Marshall were both familiar with President Edmund Pendleton's leadership of the Virginia Court of Appeals, where he strived to write a single unanimous opinion for each case.[31] In the same letter where Justice William Johnson described Washington and Marshall as "one judge," he said that his own inclination to write separate opinions was met with "nothing but lectures on the indecency of judges cutting at each other, and the loss of reputation which the Virginia appellate court had sustained by pursuing such a course" after Pendleton's death.[32] The two Virginians on the Supreme Court were almost certainly the source of these lectures due to their considerable practice experience before the Virginia Court

Because Justice Washington lived at Mount Vernon in Alexandria (pictured), Chief Justice Marshall asked him to find lodging in a local boarding house for the brethren. "If it be practicable to keep us together you know how desirable this will be," wrote Marshall in 1814.

of Appeals. Justice Washington could not establish the custom of communicating with one voice without the support of the Chief Justice, but Marshall probably could not have sustained that custom without Washington's backing. As Justice Story later said, "Justice Washington thinks (and very correctly) that the habit of delivering dissenting opinions on ordinary occasions weaken[s] the authority of the Court."[33]

The second unique tradition of the Marshall Court was that the justices lived together in a boarding house during their sessions and discussed the cases over dinner and drinks, which helps explain how unanimity was achieved so often. To quote Justice Story again,

> My brethren are very interesting men with whom I live in the most frank and unaffected intimacy . . . We moot every question as we proceed, and familiar conferences at our lodgings often came to a very quick and, I trust, a very accurate opinion, in a few hours.[34]

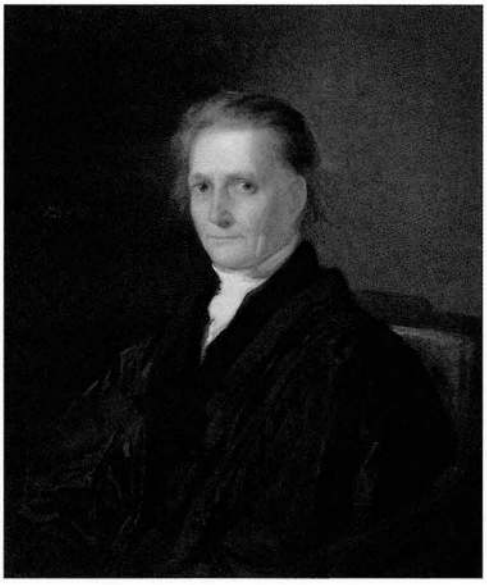
Justice Washington took charge of making these lodging arrangements, probably because at Mount Vernon he lived the closest of all the justices to the capital. After the British burned the city in 1814, Marshall's first reaction was to write Bushrod and ask whether he could still find a suitable boarding house. "We must rely on you," the Chief Justice said, "to make inquiries and if in your power to make arrangements for our accommodation. If it be practicable to keep us together you know how desirable this will be. If that be impracticable, we must be as near each other as possible. Perhaps we may dine together should we even be compelled to lodge in different houses … [G]ive me all the intelligence in your power on this interesting subject."[35]

Washington's essential role in the boarding house lifestyle is suggested by the fact that immediately after his death in 1829, some justices began living on their own during the Court's sessions and they never all roomed together again.[36] This indicates that Washington, not the Chief Justice, was the driving force behind the Court's communal life.

There is also a little-known custom that sheds light on the Chief Justice's reliance on his colleague: Washington appears to have served as the Supreme Court's unofficial secretary. In this period, of course, the justices lacked significant staff support or transcripts of oral arguments. In 1823, Marshall wrote to an attorney in *Osborn v. Bank of the United States* who wanted to submit his presentation in writing.[37] The Chief Justice stated:

> If Judge Washington will not consent to receive it; absolutely & unconditionally as an argument, it must be read over in court, & he must view it in the light of notes, and as a substitute for those which might be taken by himself.[38]

Since Marshall was the Chief Justice, why did he need Justice Washington's consent to grant the lawyer's request? The most plausible answer is that there was an informal understanding that Washington would keep the notes of oral arguments for the Court's internal use. For however long he may have performed this function, Justice Washington would have been able (intentionally or not) to shape opinions when his notes were used for discussion and opinion drafting.



The author posits that Justice Washington (pictured in 1828) played an important role on the Marshall Court by keeping the notes of oral arguments. He may have been able to shape opinions when these notes were used for case discussions and opinion drafting.

The Inner Court

Washington and Marshall's "first among equals" status on the Court is further confirmed by their willingness to take sensitive actions without consulting all their colleagues. The most famous example involves the anonymous essays that the Chief Justice wrote to defend the opinion in *McCulloch v. Maryland*, which upheld the constitutionality of the Second Bank of the United States.[39] Marshall entrusted these essays to Washington and asked him to convey them secretly to the relevant newspaper editors.[40] There is no indication that Marshall or Washington asked the other justices for their views about what could well be described as inappropriate statements about a case.[41] In *Martin v. Hunter's Lessee*, the Chief Justice recused himself from the case due to his brother's ownership of some of the property at issue.[42] Nevertheless, Marshall decided to write the petition for a writ of error from the Virginia Court of Appeals so that this important dispute about federal supremacy over state courts could be heard quickly by the Supreme Court.[43] He then gave the petition to Washington, who as the Senior Associate Justice was the presiding officer in Marshall's absence, and Washington scheduled the case for expedited argument.[44] Here as well, there is no indication that either man sought the views of the rest of the Court for these highly questionable moves.

When the Chief Justice did seek input from all his colleagues, Justice Washington's views carried special weight. In 1802, Congress eliminated all the Article III circuit judges appointed by President Adams in 1801—the infamous "midnight judges"—and restored the practice of circuit riding by

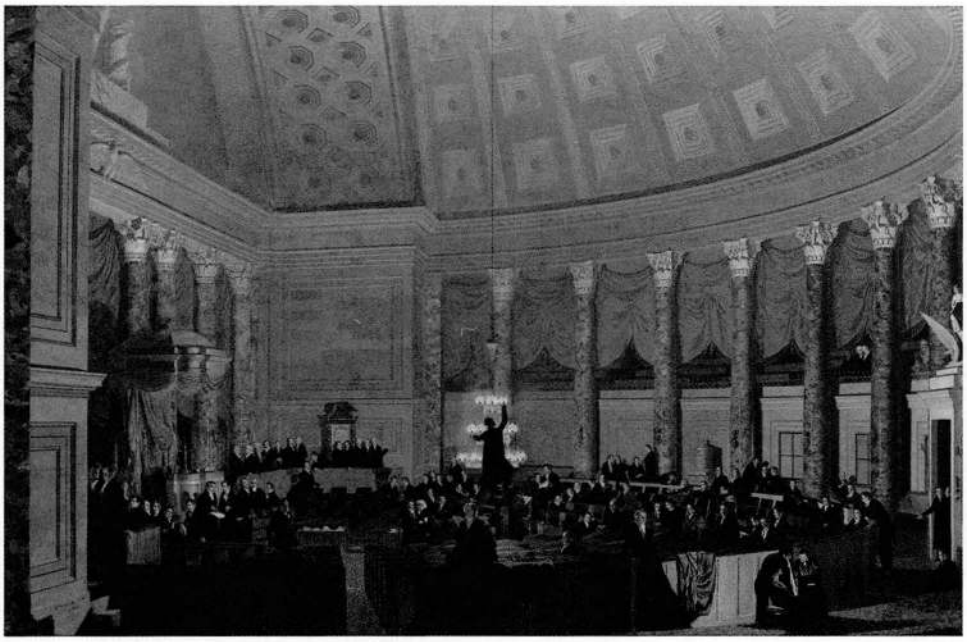
the justices that dated back to the Judiciary Act of 1789.[45] Marshall and Washington were convinced that the restoration of circuit riding was unconstitutional, in part because the circuit judges were ousted from office by a statute rather than through the more rigorous impeachment process.[46] In response, the Chief Justice wrote to all the justices, asking whether they should refuse to return to circuit riding and, in effect, go on strike against an unconstitutional "court-shrinking" statute.[47]

Washington was the first justice to oppose a strike and carried the Court with him despite the Chief Justice's reservations. The letter explaining Washington's thinking is lost, but from Marshall's subsequent description we can surmise that Washington said that a strike would be impractical at best and counterproductive at worst.[48] The justices would have to resume circuit riding and accept an unconstitutional statute because the political climate was too unfavorable.[49] Marshall was not persuaded and continued to make arguments for a strike, but the justices who responded after Washington agreed with him rather than with the Chief Justice.[50] With the benefit of hindsight, a judicial strike in 1802 would probably have been a disaster for the Supreme Court and for an independent judiciary given Jefferson's hostility toward the Federalists on the courts and his support in Congress.[51] In this instance, Marshall needed Washington's sober temperament to balance his own tendency to act boldly. Here there is an unavoidable comparison to the way in which George Washington's solid judgment was often vital for the equilibrium of his headstrong allies, most notably Alexander Hamilton.[52]

Disagreements

The strike example illustrates a broader truth about any true partnership, which is that Washington and Marshall disagreed more often than the typical narrative of the Marshall Court acknowledges.[53] While they rarely expressed separate views in public out of a desire to strengthen the Court as an institution, Washington and Marshall were independent thinkers who crossed swords more often in private. One way that the Court masked that reality was by issuing unanimous opinions that stated that a "majority" of the justices joined in the reasoning, which was just a polite way of saying that some justices dissented without opinion.[54] Sometimes the Court simply found a way to paper over its differences, which in one case led Justice Johnson to say that "the judgment partakes as much of a compromise, as of a legal adjudication."[55] Lastly, Justice Story sometimes finessed the problem by stating that other justices joined his dissenting opinions without naming them.[56]

Justice Story's cloak of anonymity over other dissenters probably concealed a split between Marshall and Washington in a significant constitutional case.[57] *Houston v. Moore* involved a constitutional challenge to a court-martial conviction in Pennsylvania for a member of the state militia who refused to answer President Madison's call to arms during the war of 1812.[58] *Houston* was argued during the Supreme Court's 1819 Term, and that summer Chief Justice Marshall assigned the opinion to Justice Story and told him that the case "cannot be in better hands. I shall sketch my ideas for the purpose of examining them more closely but shall not prepare a regular opinion . . . I do not think we shall differ."[59] When *Houston* was handed down in 1820, though, Justice Washington delivered the opinion with Justice Story and one other unnamed colleague in dissent.[60] Story must have lost his majority to Justice Washington, which again shows that Washington was a powerful voice within the Court. The other takeaway is that Chief Justice Marshall was probably the unnamed dissenter in *Houston*, given that he said privately that he agreed with Justice Story about the disposition of the case.[61]

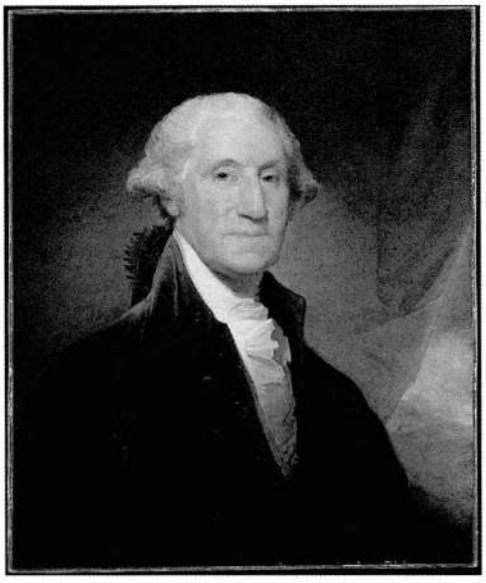


When Congress (pictured in 1822–1823) passed the 1802 Judiciary Act eliminating circuit court judges, Chief Justice Marshall proposed that his brethren refuse to ride circuit as he believed that "shrinking" the judiciary without formal impeachments was unconstitutional. Justice Washington opposed the idea, which would have failed given the political climate in Congress.

Washington's sharpest public debate with Marshall came in *Ogden v. Saunders*, where the Court upheld the constitutionality of prospective state bankruptcy laws against a Contracts Clause challenge.[62] In announcing the judgment of the Court, Washington adopted a positivist approach to contract law and rejected the Chief Justice's dissenting view that contracts flowed from natural law and thus could not be abrogated by a state bankruptcy statute.[63] Washington reasoned that state law regulated contracts prospectively in many ways that could not be distinguished from a bankruptcy statute and used some of the same examples that Justice Oliver Wendell Holmes Jr. would later invoke in his famous dissents against the "liberty of contract" doctrine.[64]

Washington and Marshall also presented dueling textual, structural, and historical readings of Article One, Section Ten of the Constitution. Justice Washington argued that the Contracts Clause should be read in harmony with the provisions in Section Ten that barred only retrospective state laws, while Chief Justice Marshall contended that the Contracts Clause was framed in general terms and therefore should be applied to all state laws that completely discharged contractual obligations.[65]

Even when Marshall and Washington broadly agreed, their jurisprudence still differed in a way that reinforces the thought that Marshall was the sail and Washington the anchor in their relationship. In *Dartmouth College v. Woodward*, both justices concluded that the New Hampshire legislature's substantial changes to Dartmouth's royal charter violated the Contracts Clause.[66] But the Chief Justice's opinion was written in his distinctive style, which involved broad statements of first principles and virtually no citations to case or scholarly authority.[67] Marshall also offered up dicta, which was a frequent indulgence in his opinions, on how the Contracts Clause might prohibit



Bushrod Washington may have been content to stay in the background and be Marshall's silent partner because he was George Washington's nephew and had developed a habit of public reticence in his relationship with his celebrated uncle (pictured).

state no-fault divorce laws if any were ever enacted.[68] Justice Washington, by contrast, took a narrower path in his separate opinion, cited authority, and avoided the issue of divorce entirely.[69] This does not mean that Marshall was incapable of writing tighter judicial opinions or that Washington was unable to summon stirring rhetoric when appropriate.[70] The point is that their contrasting styles blended together made an enormous contribution to the work of the Supreme Court.

The Hidden Hand Justice

If Bushrod Washington and John Marshall were "one judge" in the sense that together they were the center of the Marshall Court, why does Chief Justice Marshall get the lion's share of the credit? The answer is partly institutional and partly personal. On the institutional side, the convention of speaking unanimously through the Chief Justice naturally focused attention on him. Moreover, the boarding house arrangement that Washington spearheaded made most of the Court's internal deliberations oral and thus shielded them from the prying eyes of historians. Only cases that extended beyond one term or exceptional situations such as the strike debate were typically discussed in writing and reveal more of the truth.

On the personal side, Bushrod Washington was content to stay in the background and be Marshall's silent partner in a way that few others would have accepted. He bore the most famous surname in the United States and lived in the country's most famous home. He was not interested in more attention. Washington also developed the habit of public reticence in his relationship with his uncle, along with an abiding interest in building institutions that were greater than their individual members. For example, during Virginia's ratifying convention for the Constitution Bushrod said nothing on the floor but kept George—who was not a delegate—informed about the proceedings.[71] Speaking out would have been unwise because anything Bushrod said might have been attributed to George and probably would have distracted from the goal of ratification. Indeed, when Bushrod was in the state legislature, George advised him to "rise but seldom" and "offer your sentiments with modest diffidence."[72] Justice Washington took this approach to heart. Speaking out frequently as a justice would have distracted from the goal of establishing a durable Supreme Court and an impersonal rule of law.

A personal factor with an institutional twist is that Justice Washington wrote fewer Supreme Court opinions than some of his colleagues because he could see out of only one eye. Washington went partially blind in 1797 due to an unknown illness.[73] As a result, he was a slow writer, which is part of the reason why he decided not to write George Washington's biography himself.[74] In circuit court, his limited eyesight did not pose a significant problem because he could take his

time writing and editing his opinions before publishing them. On the Supreme Court, though, Washington's disability was an issue because the justices met for only four to six weeks during their annual session. As a result, he wrote far fewer Supreme Court opinions than Justice Story or Justice Johnson, which makes him look less important than he was.

Nevertheless, there are clues that show Washington's influence on opinions that were authored by someone else. *Terrett v. Taylor* involved a challenge by an Episcopal parish in Alexandria to a Virginia statute that repealed the special privileges and property that the Church retained for years after its disestablishment in 1776.[75] In a unanimous opinion by Justice Story, the Court held that the parish in question was not covered by the repeal because Alexandria was made a part of the District of Columbia before the Virginia statute was enacted.[76] Most of *Terrett*, though, criticized the Virginia statute on the merits as contrary to religious freedom and property rights.[77] When Washington was in private practice, he wrote an analysis of the Virginia proposal and concluded that the repeal of the Episcopal Church's privileges would violate the state constitution.[78] A comparison of that memo with the *Terrett* opinion reveals many similarities in reasoning and rhetoric.[79] These similarities are almost certainly not a coincidence. The more logical conclusion is that Justice Washington worked with Story on the opinion given his knowledge of the issue.[80] This probably happened in other cases, but *Terrett* is the only case where there is proof.

Another piece of circumstantial evidence for the ballast that Washington gave to the Marshall Court comes his initial absence in *Green v. Biddle*. *Green* involved a challenge to two Kentucky real property statutes that were invalidated by the Court.[81] Justice Washington was ill and did not participate in *Green*. Justice Story's terse opinion for the Court was poorly received, in part because he cited no cases, said almost nothing about the Constitution, and relied instead on "general principles of law" and "first principles of justice."[82] As a result, Senator Henry Clay of Kentucky, the ex-Speaker of the House of Representatives and a formidable Supreme Court advocate in his own right, urged the Court to hear a second argument in *Green*.[83]

The second time around, Justice Washington was present and rewrote Justice Story's opinion. While reaching the same conclusion as Story, Washington wrote a longer opinion with considerable citations to authority and made clear that "our opinion is founded exclusively upon the Constitution of the United States."[84] Washington's opinion in *Green* did not end the controversy over the Court's ruling (especially in Kentucky), but the bottom line is that without Washington's presence the Court fell into a self-inflicted wound that his usual sensibilities and caution tended to prevent.

John Marshall's View and His Legacy

In assessing the affinity between Washington and Marshall that built the foundation of the Supreme Court, the final word comes from Chief Justice Marshall himself. Upon hearing the news of Justice Washington's death in 1829, the Chief Justice told James Madison simply: "I need not say how much I regret his loss."[85] Marshall later sent a letter to Judge Joseph Hopkinson praising his eulogy for Washington:

> He was indeed one of the worthiest and best, and therefore one of the most beloved of men. In amiableness of manners, in excellence of heart, in professional acquirements and in soundness of intellect, he was all that you have represented him. His loss is deplored by no person more than myself.[86]

Even after Bushrod's death, Marshall still wanted his friend's counsel. At one point,

he asked Justice Story about a difficult legal issue, saying

> I recollect a conversation between you and Judge Washington on some question connected with this in which I believe, though I am not certain, you did not concur . . . I did not attend to the conversation and do not recollect it with any sort of accuracy. Will you, if you have any recollection on this subject, or if you have any fixed judgement on the question, drop me a line.[87]

Understanding the Marshall Court as a genuine team rather than as the work of a single genius is right not only because it is accurate. Viewing Chief Justice Marshall as synonymous with the Marshall Court sets an impossible standard for his successors to match. More than once, a Chief Justice who could not persuade his colleagues in an important case must have wondered: "How did Marshall do it all by himself and why can't I?" The reassuring answer is that Marshall did not act alone. Without Bushrod Washington, the Marshall Court would not have succeeded.

The author is the Samuel R. Rosen Professor, Indiana University Robert H. McKinney School of Law.

ENDNOTES

[1] Letter from William Johnson to Thomas Jefferson, December 10, 1822, at https://founders.archives.gov/?q=William%20johnson%201822%20Author%3A%22Johnson%2C%20William%22&s=1511311111&r=3.

[2] *Ibid.*

[3] See Magliocca, **Washington's Heir: The Life of Justice Bushrod Washington** (forthcoming Oxford Univ. Press, 2022). My inspiration for this insight came from Herbert A. Johnson's law review article on Justice Washington written more than a decade ago. See Johnson, "Bushrod Washington," 62 *Vanderbilt Law Review* (2009) 448.

[4] Beveridge, **The Life of John Marshall**, 1: 158 (1916); see *ibid.* at 2: 413 (stating that Justice Washington "had no more political acumen than a turtle").

[5] See, e.g., Howe, **What Hath God Wrought: The Transformation of America, 1815–1845**, 2007, 121.

[6] See Stern & Wermiel, **Justice Brennan: Liberal Champion**, 2010, 250–52; Newman, **Hugo Black**, 1994, 471; see generally Newton, **Justice For All: Earl Warren and the Nation He Made**, 2006.

[7] See Smith, **John Marshall: Definer of a Nation**, 1996, 75–80; *see also* "Original Records of the Phi Beta Kappa Society," 4 *William and Mary Law Quarterly* (1896) 215 (listing Washington and Marshall among the society's members).

[8] See Letter from George Washington to David Stuart, November 30, 1787, in **5 Papers of George Washington: Confederation Series**, 1997, eds. W.W. Abbot & Dorothy Twohig, 467 ("With great pleasure I received the information respecting the commencement of my Nephew's political course. I hope he will not be so buoyed up the favorable impression it has made as to become a babbler.").

[9] See Letter from James Madison to Thomas Jefferson, April 22, 1788, in 11 **The Papers of James Madison** 28, eds. Robert A. Rutland & Charles F. Hobson (including Washington among the Federalists in the upcoming state ratifying convention and calling him "a young gentleman of talents"); Maier, **Ratification: The People Debate the Constitution, 1787–1788**, 2010, 257 (noting Marshall's presence at the ratifying convention).

[10] For cases where they cooperated, see, e.g., *Hooe v. Marquess*, 8 Va. 416 (1798); *Stephens v. White*, 2 Va. 203 (1796). For cases where they were opponents, see, e.g., *Tuberville v. Self*, 8 Va. 850 (1795); *Burnley v. Lambert*, 1 Va. 308 (1794).

[11] The records of the Richmond Council, which are held by the Library of Virginia, note Washington and Marshall's election in 1794 and their joint service on committees until Washington resigned in 1795 due to his move to a new home outside of his district.

[12] *Virginia Gazette and General Advertiser* (Richmond), August 14, 1798; see McCullough, **John Adams**, 2001, 495–98.

[13] Marshall's military service was extensive and included the brutal winter at Valley Forge. See Smith, **Marshall**, 44–69. Washington's action was limited to part of the Virginia campaign in 1781. See Letter from Bushrod Washington to Joseph Delaplaine, March 12, 1818 (Tulane University Library) (describing his service in a cavalry regiment at the Battle of Green Spring).

[14] See Finkelman, **Supreme Injustice: Slavery in the Nation's Highest Court**, 2018, 36–47 (documenting Marshall's extensive ownership of more than 200 people); "Judge Washington," *Niles' Register*, September 29, 1821, 70–72 (reprinting a letter from Bushrod Washington defending his sale of fifty-four enslaved people from Mount Vernon.

[15] See Smith, **Marshall**, 375–76 (discussing the mental health struggles of "Polly" Ambler Marshall); Binney, **Bushrod Washington**, 1858, 8 (describing Ann Blackburn Washington as "valetudinary"); Brown, **1 The Forum: Or, Forty Years Full Practice at the Philadelphia Bar**, 1856, 366 ("Mrs. Washington was an accomplished woman, but of a highly excitable and nervous temperament.").

[16] See Stewart, **George Washington: The Political Rise of America's Founding Father**, 2021, xxi–xx.

[17] See Chernow, **George Washington: A Life**, 2010, 787–88. Justice Washington told Martin Van Buren his version of the story when Van Buren visited Mount Vernon in the 1820s. See Fitzpatrick, ed. **2 The Autobiography of Martin Van Buren,** 1920, 177–78.

[18] See Last Will and Testament of George Washington, July 9, 1799 (Mount Vernon Library). Martha Washington had a life estate in Mount Vernon until her death in 1802.

[19] See Marshall, **The Life of George Washington** 5 vols., 1804–1807; Letter from John Marshall to Bushrod Washington, March 25, 1804, in **Papers of John Marshall Digital Edition**, 2014, ed., Charles Hobson (asking Washington to review his latest draft and give him editorial comments).

[20] Letter from Bushrod Washington to Martha Washington, January 26, 1800 (Mount Vernon Library) (stating that he would consult with Marshall about a difficult point raised by George Washington's will).

[21] See Letter from John Adams to Timothy Pickering, September 13, 1798, at https://founders.archives.gov/?q=%20Author%3A%22Adams%2C%20John%22%20Recipient%3A%22Pickering%2C%20Timothy%22&s=1111311111&r=32.

[22] Letter from Timothy Pickering to John Adams, September 20, 1798, at https://founders.archives.gov/?q=%20Recipient%3A%22Adams%2C%20John%22&s=1111312111&sa=pickering&r=79.

[23] Letter from John Marshall to Timothy Pickering, September 28, 1798, in **Papers of John Marshall Digital Edition**.

[24] See, e.g., Letter from John Marshall to Bushrod Washington, May 31, 1824, in **Papers of John Marshall Digital Edition**; Letter from John Marshall to Bushrod Washington, May 31, 1819, in **Papers of John Marshall Digital Edition**. More of Marshall's letters to Washington on circuit matters survive than vice versa.

[25] Letter from John Marshall to Bushrod Washington, July 13, 1821, in **Papers of John Marshall Digital Edition**.

[26] Letter from John Marshall to Bushrod Washington, April 19, 1814, in **Papers of John Marshall Digital Edition**.

[27] See Letter from Bushrod Washington to Alexander Hamilton, April 15, 1802, in **25 The Papers of Alexander Hamilton**, 1974, ed. Harold C. Syrett, 602–05 (asking Hamilton for his recollections about aspects of the 1776 campaign in which he served as George Washington's officer). When Washington decided in the 1820s to revise his published reports of cases decided by the Virginia Court of Appeals, Marshall returned the favor and did research for Bushrod in Richmond. See Letter from John Marshall to Bushrod Washington, April 15, 1822, in **Papers of John Marshall Digital Edition**; see also Washington, **Cases Argued and Determined in the Court of Appeals of Virginia**, 2 vols. 1798 (setting forth the first edition of these reports).

[28] Letter from John Marshall to Bushrod Washington, April 20, 1804, in **Papers of John Marshall Digital Edition**; cf. Letter from Bushrod Washington to Caleb P. Wayne, June 22, 1804 (University of Virginia Library, Special Collections) (stating that he "went to Richmond and continued with Mr. Marshall until we went through the reading and correcting of the third volume").

[29] Letter from Bushrod Washington to Caleb P. Wayne, June 22, 1804 (University of Virginia Library, Special Collections).

[30] Some of Justice Washington's opinion drafts are available, but they do not indicate what comments he may have received or from whom.

[31] See Henderson, "From Seriatim to Consensus and Back Again: A Theory of Dissent," *Supreme Court Review* 2007: 304 (stating that Pendleton got the idea from Lord Mansfield, one of the greatest English common law judges).

[32] Letter from William Johnson to Thomas Jefferson, December 10, 1822.

[33] Letter from Joseph Story to Henry Wheaton, April 18, 1818, in **1 Letters of Joseph Story**, 303–04.

[34] Letter from Joseph Story to Samuel P.P. Fay, February 24, 1812, in **1 Letters of Joseph Story**, 1851, ed. William Wetmore Story, 215.

[35] Letter from John Marshall to Bushrod Washington, December 29, 1814, in **Papers of John Marshall Digital Edition**; see Letter from Bushrod Washington to William Cranch, December 27, 1816 (Cincinnati History Museum and Library) (stating that "the judges appeared to be all pleased with their situation last winter" but that he would try to arrange a stay in a new house with "Mrs. Wadsworth. We require 7 bedrooms and one dining room").

[36] See Smith, **Marshall**, 507. It is possible that the breakdown of the boarding house system was coincidental to, rather than caused by, Justice Washington's death, but the evidence points toward causation. In part, that may be because no other justice was interested in taking the time to make the housing arrangements.

[37] *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); see Letter from John Marshall to

Charles Hammond, December 23, 1823, in **Papers of John Marshall Digital Edition**.

[38] See Letter from John Marshall to Charles Hammond, December 23, 1823, in **Papers of John Marshall Digital Edition**.

[39] 17 U.S. (4 Wheat.) 316 (1819); see Gunther, "'A Friend of the Constitution': In Defense and Elaboration of McCullough v. Maryland." 21 *Stanford Law Review* (1969) 449–55.

[40] See, e.g., Letter from John Marshall to Bushrod Washington (May 6, 1819), in **Papers of John Marshall Digital Edition**; see also Letter from John Marshall to Bushrod Washington, June 17, 1819, in **Papers of John Marshall Digital Edition** ("As the numbers will be marked, I hope no mistake will be made by the printer and that the manuscript will be given to the flame.").

[41] Justice Story was informed of these essays but was not consulted. See Letter from John Marshall to Joseph Story, May 27, 1819, in **Papers of John Marshall Digital Edition**.

[42] See Smith, **Marshall**, 427.

[43] 14 U.S. (1 Wheat.) 304 (1816). Marshall's petition in *Martin*, along with Justice Washington's marginal notations, is in the National Archives.

[44] See White, "The Working Life of the Marshall Court, 1815–1835," 70 *Virginia Law Review* (1984) 1, 15 (laying out the evidence for this chain of events). Washington then assigned the *Martin* opinion to Justice Story, who wrote for the Court.

[45] See Judiciary Act of 1802, ch. 31. 2 Stat. 256 (repealing the Judiciary Act of 1801); Glickstein, "After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801," 24 *Yale Journal of Law and the Humanities* (2012) 543–78.

[46] See Letter from John Marshall to William Cushing, April 19, 1802, in **Papers of John Marshall Digital Edition**; see also Letter from Bushrod Washington to David Daggett, December 8, 1818 (Yale University Library) ("It is very obvious that the Judges of the Supreme Court have and can have no constitutional authority to hold the Circuit Courts."); Ackerman, **The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy**, 2005, 277–97 (reprinting an essay by Judge Richard Bassett arguing that the ousting of the circuit judges was unconstitutional).

[47] See Letter from John Marshall to William Cushing, April 19, 1802, in **Papers of John Marshall Digital Edition**.

[48] See Letter from John Marshall to William Paterson, May 3, 1802, in **Papers of John Marshall Digital Edition** (explaining that Justice Washington believed "that the question respecting the constitutional right of the Judges of the supreme court to sit as circuit Judges ought to be considered as settled & should not again be moved"). Justice Samuel Chase was the first to respond to Marshall's letter and supported convening a meeting to discuss a strike. See Letter from Samuel Chase to John Marshall, April 24, 1802, in **Papers of John Marshall Digital Edition**.

[49] *Marbury v. Madison* is the most famous instance in which the Marshall Court bowed to political reality by declining to order Secretary of State Madison to give William Marbury his judicial commission.

[50] See Ackerman, **Failure of the Founding Fathers**, 170; Smith, **Marshall**, 307–08. The Court upheld the restoration of circuit riding in a brief opinion handed down alongside *Marbury*. See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

[51] In 1804, the House of Representatives impeached Justice Samuel Chase. He was acquitted by the Senate, the likelihood of a guilty verdict would have been greater if he had gone on strike in 1802.

[52] See Chernow, **Alexander Hamilton**, 2004, 289–90.

[53] For some cases in which Washington and Marshall disagreed in public that are not discussed in the text, see *Mason v. Haile*, 25 U.S. (12 Wheat.) 370 (1827); *ibid.* at 379–83 (Washington, J., dissenting); *The Merrimack*, 12 U.S. (8 Cranch) 317 (1814); *ibid.* at 334 n.* (Story, J., dissenting in part) (including a note by the Court Reporter stating that Justice Washington joined this dissent from Chief Justice Marshall's opinion for the Court); *The Venus*, 12 U.S. (8 Cranch) 253 (1814); *ibid.* at 288–317 (Marshall, C.J., concurring in part and dissenting in part from Washington's opinion for the Court); *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805); *ibid.* at 397–405 (statement of Washington, J.) (dissenting in part from Marshall's opinion for the Court despite recusing himself from voting in the case).

[54] See, e.g., *United States v. Gurney*, 8 U.S. (4 Cranch) 333 (1808) (referring repeatedly to the agreement of a majority but formally expressing itself as unanimous).

[55] *Ogden v. Saunders*, 25 U.S. (6 Pet.) 213, 272–73 (1827) (Johnson, J., concurring) (describing *Sturges v. Crowninshield*).

[56] See, e.g., *United States v. 1,960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 405–06 (1814) (Story, J., dissenting) (stating that "two of my brethren concur" in his dissent without naming them).

[57] Washington may also have joined Justice Story's dissent from one of Marshall's opinions. See *Brown v. United States*, 12 U.S. (8 Cranch) 110, 154 (1814) (Story, J., dissenting) (noting that two unnamed justices concurred with his dissent in a prize case); Smith, **Marshall**, 653 n. 5 (advancing this hypothesis in part because Washington and Marshall disagreed publicly in two other prize cases during the 1814 Term).

[58] 18 U.S. (5 Wheat.) 1 (1820).

[59] Letter from John Marshall to Joseph Story, July 13, 1819, in **Papers of John Marshall Digital Edition**.

Marshall referred to *Houston* as "the militia case," but there was no militia case argued in the 1819 Term other than *Houston*.

[60] See *Houston*, 18 U.S. (5 Wheat.) at 67–76 (Story, J., dissenting).

[61] There is no way to know for certain, as Marshall may also have switched his vote after seeing Washington's draft opinion.

[62] See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827); see also U.S. Const., art. I, § 10, cl. 1.

[63] See *Ogden*, 25 U.S. (12 Wheat.) at 254–70 (opinion of Washington, J.); *id.* at 332–56 (Marshall, C.J., dissenting). *Ogden* was the only constitutional case in which Chief Justice Marshall wrote a dissenting opinion.

[64] See *ibid.* at 259 (opinion of Washington, J.) (citing usury laws, the statute of frauds, statutes of limitations, and laws that "limit the fees of professional men and the charges of tavern keepers"); *id.* at 261 ("If it be conceded that *those laws* are not repugnant to the constitution, so far as they apply to subsequent contracts, I am yet to be instructed how to distinguish between those laws, and the one now under consideration."); see also *Adkins v. Children's Hospital*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting) (citing statutes of frauds as an example of state interference with freedom of contract); *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (invoking usury as another established category).

[65] Compare *Ogden*, 25 U.S. (12 Wheat.) at 265–68 (opinion of Washington, J.), with *ibid.* at 335–36 (Marshall, C.J., dissenting).

[66] 17 U.S. (4 Wheat.) 518 (1819).

[67] See *ibid.* at 624–54.

[68] See *id.* at 629.

[69] See *id.* at 654–66 (opinion of Washington, J.).

[70] For an example of Justice Washington writing in Marshall's style to uphold federal authority against a state legislative challenge, see *United States v. Bright*, 24 F. Cas. 1232 (C.C.D. Pa. 1809) (No. 14,647).

[71] See Letter from Bushrod Washington to George Washington, June 7, 1788, in **6 Papers of George Washington: Confederation Series**, 315.

[72] Letter from George Washington to Bushrod Washington, November 9, 1787, in **5 Papers of George Washington: Confederation Series**, 424.

[73] See Letter from Timothy Pickering to John Adams, September 20, 1798, at https://founders.archives.gov/?q=%20pickering%20%20Author%3A%22Pickering%2C%20Timothy%22%20Recipient%3A%22Adams%2C%20John%22&s=1111311111&r=78 (stating that Washington's "indefatigable pursuit of knowledge and the business of his profession has deprived him of the sight of one eye—It will be happy if the loss of the other does not make him perfectly the emblem of [blind] Justice."); see also Letter from Hannah Bushrod Washington to Bushrod Washington, February 3, 1797 (Mount Vernon Library) (indicating that this was when his eyesight was compromised).

[74] See Letter from Bushrod Washington to Doctor Morse, February 18, 1800 (Historical Society of Pennsylvania) (explaining why he would not write the biography).

[75] 13 U.S. (9 Cranch) 43 (1815).

[76] See *ibid.* at 44–45.

[77] See *id.* at 51–52.

[78] Opinion of Bushrod Washington, Esq. on the Subject of the Glebes and Churches, December 27, 1797 (University of Virginia Library, Special Collections). It is unclear if the memo was written for the Church or for another interested client.

[79] Compare, e.g., *ibid.* at 1–2 ("[C]ontemporaneous opinions, as to the true constructions of a law is in such case a fair and proper standard, by which ours should be formed. The first legislature which convened after the formation of [Virginia's] constitution, and composed chiefly of the same members, passed a law upon the very subject; which may be considered as a commentary upon the clause in question."), with *Terrett*, 13 U.S. (9 Cranch) at 51 (stating that the law enacted in 1776 reaffirming the Church's privileges "is not only a contemporaneous exposition of the constitution, but has the additional weight that it was promulgated or acquiesced in by a great majority, if not the whole, of the very framers of the constitution").

[80] Granted, one could argue that Justice Washington should have recused himself from *Terrett* because of his prior connection to the issue.

[81] See *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823).

[82] See *ibid.* at 11–12 (quoting Justice Story's initial opinion).

[83] See *id.* at 17–18 (motion of Mr. Clay as *amicus curiae*).

[84] *Id.* at 90; see *id.* at 69–94.

[85] See Letter from John Marshall to James Madison, November 30, 1829, https://founders.archives.gov/?q=%20Author%3A%22Marshall%2C%20John%22%20Recipient%3A%22Madison%2C%20James%22&s=1111311111&r=3

[86] See Letter from John Marshall to Joseph Hopkinson, December 17, 1830, in **Papers of John Marshall Digital Edition**.

[87] See Letter from John Marshall to Joseph Story, May 15, 1833, in **Papers of John Marshall Digital Edition**.

If Walls Could Talk: The Supreme Court and DACOR Bacon House Two Centuries of Connections

Terence Walz

The Supreme Court Justices had to make do holding their conferences in many "satellite homes" before finding permanent residence in the majestic Marble Palace in 1935. Most notably, Chief Justice John Marshall delivered his opinion in *Marbury v. Madison* (1803) in the fancy parlor at Stelle's Hotel because an ailing Justice could not walk over to the Capitol building from the hotel where they were lodging that Term. After the British marched into Washington in 1814 and burned the Capitol building, Clerk of the Court Elias Caldwell opened up his own home for the Justices to hold Court sessions in the 1815–1816 Terms. But no abode served as a home away from home more consistently or provided greater hospitality than the building that is now known as the DACOR Bacon House. This study of all the Justices who crossed the threshold of that red-brick building shows how important it was as a space not just to hold conferences deliberations, but also served as a boarding house, a place to socialize, and a venue for welcome dinners for newly appointed Justices.

Tench Ringgold Era

DACOR Bacon House, located on the corner of 18th and F Streets in the northwest quadrant of the District of Columbia, was built by Tench Ringgold, the U.S. marshal for the District of Columbia (1818–1831), who maintained an office at the Capitol and was in charge of the safe-keeping of the building, the distribution of keys to offices, and even the upkeep of its furnishings.[1] The marshal was also deeply involved in the planning of three quadrennial inaugurations during his time in office and the celebrations that accompanied them and, thus, in multiple ways, was in steady contact with the Justices of the Supreme Court. He had been appointed in 1818 by President James Monroe, a friend, but was already a well-known personality in Washington, admired for his energetic,

DOI: 10.1111/jsch.12285

The Ringgold-Carroll House, known since 1985 as DACOR Bacon House, was built by Tench Ringgold when he was the U.S. marshal for the District of Columbia (1818–1831). Innumerable Supreme Court justices have lodged, resided, held judicial conference, attended welcome dinners for new justices, and socialized on its premises.

outsized personality and entrepreneurial spirit, and as someone with extensive family and political connections.

It would have been natural for him to invite Justices of the Supreme Court with whom he had many dealings over the years to his home on F Street, but the first documented visitor we know of was the future Chief Justice Salmon P. Chase, who had recently settled in Washington to teach law classes in 1829. He called on Tench just prior to the wedding of one of Ringgold's daughters. Three days later, Chase attended the celebration "as an onlooker," as he noted in his diary, providing a lively account of the gathering and a glimpse of the house:

> Many beaux promenaded the rooms and many belles dying for their attentions. Mr. R—was bustling about like a [m]an determined that if his guests were not pleased it should be thro no fault of his. . . . At 10 large folding doors were thrown open displaying to the gourmands of the company a most pleasing spectacle. An instant rush was made toward the tables; yet the gallantry of the gentlemen [allowed] them to resist until the fairer half of creation had retired. Then however hams, rounds of beef, chicken were not spared. Pyramids of ice were demolished in less time than is required to record their fate. Wine flowed in rivers—and rivers [were] drank dry.[2]

His visit might be said to have set the stage for the arrival, three years later, of five of six Supreme Court justices, headed by Chief Justice John Marshall, who boarded at Ringgold's house for the 1832 Term, which lasted three months, January through March. Marshall had for many years encouraged the Justices to share quarters during the Court Terms in an effort to foster a consensus of opinion. He chose the Ringgold house just after the death of his beloved wife, Polly, whose loss left the Chief Justice in tears, according to Justice Joseph Story, who came

into his room one morning and found him disconsolate.[3] Also boarding at the house that Term were Justices Gabriel Duvall, Smith Thompson, and Henry Baldwin.[4] They shared meals at the Ringgold's dining room table and retreated to the comfortable south parlor room for discussions of upcoming cases and deliberations of argued cases. It would have been here that Marshall famously would ask Justice Story if it was raining, and whatever the weather, to bring out the fortified Madeira he was fond of.

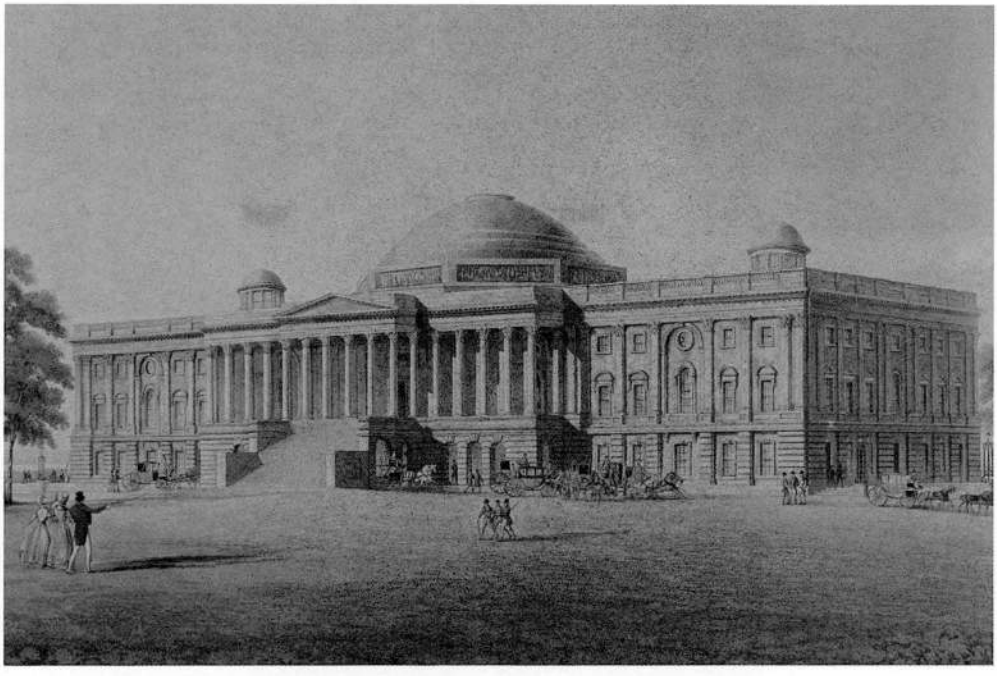
The house was two miles distant from the Capitol. Marshall wrote his son Edward Carrington Marshall in February 1832 that he could cover the distance "without fatigue" and often Story would join him.[5] The other Justices had begun making other arrangements for boarding; during the 1833 Court Term only Marshall and Story kept company at Ringgold's establishment.[6] Part of the reason Marshall and Story continued to stay with Ringgold is that they felt sorry for him. In April 1831, he had lost his job as marshal and both the Justices had "condoled" him at the time.[7]

Sally and William T. Carroll Era

As a result of not paying the mortgage due on the house, Ringgold was obliged to relinquish it the following year, and in 1835 it was sold to former governor of Maryland Samuel Sprigg who gave it to his daughter Sally and her husband, William T. Carroll, clerk of the Supreme Court during 1828–1863.[8] William would have been friendly with all his colleagues at the Court. The Carrolls were particularly close to Justice John Catron. They asked him to recommend the appointment of their son Samuel Sprigg Carroll (later Maj. General) to West Point in 1852.[9] When the Carrolls entertained, which was often, many no doubt received an invitation from Sallie to join them. To one party given at the end of 1846, Elizabeth Dixon, wife of the new Massachusetts congressman, was invited and she wrote in her diary that she spotted Justice Catron and his wife, Matilda, and newly appointed Justice Samuel Nelson and his wife, Catherine, among the guests. After mentioning as many as she could remember, she noted, "There was an elegant supper, with pyramids & one had a lamp in it giving it the effect of a little coloured lantern."[10]

When Chief Justice Roger B. Taney administered the oath of office to Abraham Lincoln in March 1861, Lincoln's family Bible had not yet arrived from Springfield. In lieu of a personal Bible or book, William Carroll offered a copy of the Bible he kept in his office for such occasions. After the oath was taken, Carroll dedicated the Bible to his beloved wife Sally Sprigg Carroll and wrote on a blank page at the end, "I, William Thos. Carroll, clerk of the said court do hereby certify that the preceding copy of the Holy Bible is that upon which the "Honble. R.B. Taney", Chief Justice of said Court, administered to His Excellency, Abraham Lincoln, the oath of office as President of the United States." This Bible, known as the "Lincoln Bible" in the Library of Congress, was later used by presidents Barack Obama and Donald Trump.[11]

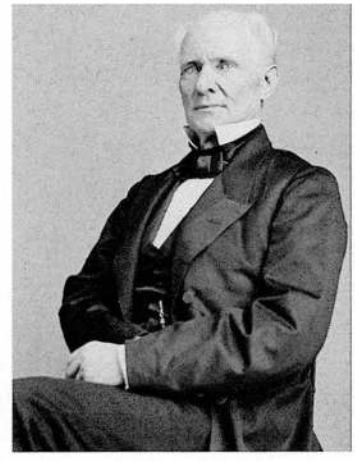
William Carroll died during the Civil War, and he did not live to see his youngest daughter, Alida, marry Maj. General John Marshall Brown, son of one of Portland, Maine's wealthiest merchants in 1866. The couple had probably been introduced by Justice Nathan Clifford, also from Maine, whose daughter Fannie was married to Gen. Brown's older brother.[12] After the war, Carroll's wife, Sally, continued to entertain the Washington society with its mixture of political and judicial figures, the diplomatic corps, and, increasingly, the newly wealthy who came to the city for political purposes or "for the season." Mrs. Samuel Gouverneur recalled in her memoir **As I Remember,** "William Thomas Carroll's residence on the corner of Eighteenth and F Streets witnessed a



Chief Justice Marshall wrote his son that he could cover the distance to the Supreme Court from the boarding house "without fatigue" and that often Joseph Story would join him on his walk. Above is the Capitol building, where the Court was lodged, in the 1820s.

continuous scene of hospitality. Mrs. Carroll was never happier than when entertaining. She lived to an advanced age and until almost the very last, remained standing while receiving her guests."[13] Among the many guests who came to the house was Sue Swearingen Field, the wife of Associate Justice Stephen Field, who was an equally popular hostess.[14] Sally and Sue had a mutual friend in Esther Gracie Lawrence, better known as Mrs. William Lamont Wheeler, who was at one time a leader of Newport intellectual society and author of several novels, one of which was set in Washington and dedicated to Mrs. Field.[15] When Mrs. Wheeler came to Washington—she and her husband were staunch supporters of Grover Cleveland and came for his inauguration in 1885—they stayed part of their time with Mrs. Field and part with Mrs. Carroll on F Street.[16]

In 1891, the newly appointed senator from Louisiana, Edward Douglass White, grandson of Tench Ringgold, later associate



William T. Carroll, clerk of the Supreme Court from 1828–1863, and his wife Sally entertained the justices after they became the house's owners in 1835. Responsible for overseeing filings with the Court and maintaining its records, William, who had been one of the first professors of law at Columbian College (now George Washington University), was a social peer of the justices. He died in 1863 but Sally continued her hosting duties until her death in 1895.

Molly Fuller had the "south" parlor room on the second floor converted into a library/office for her husband, Chief Justice Melville Fuller (above), when they purchased the Ringgold House in 1895. They hosted the justices on Saturdays for conference deliberations as it was more comfortable than the space allotted in the Capitol building.

justice and then Chief Justice of the Supreme Court, hired his cousin, James T. Ringgold, another grandson of Ringgold, to be his assistant. He, unlike White, knew his way around Washington. When White was appointed an associate justice of the Supreme Court in 1894, Ringgold went with him. Sadly, however, his mental state deteriorated, and after only a short time as a law clerk, White was obliged to let him go. Ringgold was committed to an asylum in Baltimore in 1896, and after his release, took to drink from which he died in 1899. He was buried in Oak Hill cemetery in an unmarked grave near the resting place of his father, Thomas Lee Ringgold, Tench's youngest son.[17]

Molly and Melville Fuller Era

Justice White came on to the Court under the chief justiceship of Melville Fuller (1888–1910), and when Molly Fuller decided to buy the Carrolls' residence after old Mrs. Carroll died in 1896—charmed, it is said, by the erstwhile association with Chief Justice John Marshall—the house on F Street once again found itself intimately connected with the Supreme Court. Molly had the "south" parlor room on the second floor converted into a library for the chief justice, and since the court chambers in the Capitol never included offices for the justices, it was in the new library on F Street that Chief Justice Fuller worked. Eugene Brooks, the African American who worked for him as a messenger, also called "body servant" in those days, accompanied him back and forth between F Street and the Court chamber while it was in session. Brooks carried the load of briefs the Chief Justice needed to study, and then took them, once opinion-writing assignments had been made, to each of the Justice's homes

where they had their offices. Working with him in the library was his clerk and secretary, Clarence M. York, until his death in 1906, and in his later years, Stephen, the son of Justice William R. Day, and Colley Wood Bell, the son of photographer C. M. Bell.[18]

Following the custom inaugurated by Chief Justice Marshall, Fuller began inviting the justices to meet at the F Street house on Saturdays to discuss upcoming cases. Usually, he would not assign cases to particular justices until Monday: Being a religious man and a communicant at St. John's Church, he took the Sabbath seriously. This, however, caused dissatisfaction among some of them. Justice Oliver Wendell Holmes, in particular, liked to get started early and wanted his assignments to be given on Saturday or Sunday latest.[19] Molly Fuller invited the wives of the justices to her "at home" receptions on Mondays. In accordance with the social protocol of official Washington society, Supreme Court Justices opened their homes on Mondays to wives of members of Congress, Cabinet officials, diplomats, and other dignitaries for tea and music.[20]

The Fullers also gave a special dinner to welcome each of the newly appointed Justices to the Court and to Washington. Charles Butler, the Court's Reporter of Decisions, attended the dinner party given for Justice Day after he was confirmed in 1903. He described it as a "most enjoyable affair," adding that after Mrs. Fuller had retired for the evening upstairs, she called down to one of the young guests at the dinner, an officer who would shortly be posted to the Philippines: "And when you get to the Philippines, you tell Willie Taft not to be in too much of a hurry to get into my husband's shoes."[21] The previous year, the Fullers had hosted President Theodore Roosevelt at a dinner honoring Holmes after his confirmation as associate justice.[22] After Molly Fuller died in the summer of 1904, the Chief Justice continued to hold these dinners, perhaps the last one being in 1907 to honor the arrival of Associate Justice William H. Moody on the Court. Once again, President Roosevelt was the ranking guest, the others being the associate justices, the German ambassador, and other political and diplomatic notables. For the occasion, the dining room table was decorated with a centerpiece of "Richmond roses and mignonettes."[23]

Messenger Eugene Brooks carrying a box of briefs from the Court for Chief Justice Fuller (right) to work on at home. Fuller made opinion-writing assignments on Mondays after hosting Saturday conferences; Brooks would deliver the assignments to the justices' homes.

Chief Justice Fuller died in 1910, and eventually the house was purchased by Representative Robert Low Bacon and his wife, Virginia Murray Bacon. They continued the tradition of entertaining official Washington, including members of the Supreme Court. Mrs. Bacon was very proud of the connection between her house on F Street and the Supreme Court, and hoped at one point that the Court might accept it as a gift. This never came to pass, and eventually it was given to the association of Diplomatic and Consular Officers Retired (DACOR), which took over the house in 1985. It is hard to estimate how many Supreme Court Justices have darkened its doorways, but it is likely that most Justices

who served on the Court between 1800 and 1950 either slept, dined, deliberated cases, or made merry at the DACOR Bacon House.

Terence Walz is an independent historian.

ENDNOTES

[1] After the Capitol building was burned by the British in 1814, Ringgold ordered new furniture and furnishings for the Supreme Court chambers: "Notice to Cabinet-Makers": *City of Washington Gazette*, December 14, 1818, 3.

[2] Salmon Portland Chase and John Niven, **Salmon P. Chase Papers: Vol. 1, Journals, 1829–1872** (Kent, OH, Kent State University Press, 1993), 29.

[3] Joseph Story to Mrs. Sarah H. Story, March 4, 1832, in **Life and Letters of Joseph Story: Associate Justice of the Supreme Court of the United States, and Dane Professor of Law at Harvard University**, vol. 2 (Boston: C.C. Little and J. Brown, 1851), 86–87.

[4] Justice William Johnson was ill and did not attend the Term; Justice John McLean made other housing arrangements.

[5] Charles Hobson, ed., **The Papers of John Marshall Digital Edition** (Charlottesville: University of Virginia Press, Rotunda, 2014), vol. 12, xxii.

[6] See generally, William Davenport Mercer, "The Last Days of the Marshall Court," *Journal of Supreme Court History*, Vol. 44, no. 2 (July 2019): 135–53.

[7] As Marshall wrote Polly, Hobson, ed., **The Papers of John Marshall Digital Edition,** vol. 12, 17.

[8] The seller, John Moylan Thomas, was the husband of Ringgold's daughter, Sarah; he was also the cousin of Sally Sprigg Carroll.

[9] Justice Catron: USMA Cadet Applications, 1805–1866, 1851: file #001-75, on Ancestry.com.

[10] https://www.whitehousehistory.org/introduction-to-the-transcription-of-the-washington-diary-of-elizabeth-l-c-dixon, entry for December 29, 1846.

[11] https://blogs.loc.gov/loc/2013/01/oath-of-office/.

[12] Jamie Rice, Director of Collections and Research, Maine Historical Society, "The Princes of Portland: The Brown Family of Bramhall and Thornhurst," lecture. See YouTube, The Princes of Portland: The Brown family of Bramhall & Thornhurst—An 1822 Leadership Circle Event.

[13] Marian Campbell Gouverneur, **As I Remember: Recollections of American Society During the Nineteenth Century** (New York: D. Appleton, 1911), 214–15.

[14] Sue Field came to a huge tea Sally gave for the former speaker of the House, Robert Winthrop, in May, 1886: *Evening Star*, May 11, 1886, 2.

[15] "To Washington's popular hostess / MRS. FIELD / wife of the eminent jurist / this little story is inscribed / a slight token of the / author's regard:" frontispiece of Esther Gracie Lawrence, **A Washington Symphony** (New York: G. P. Putnam's Sons, 1893); on Mrs. Wheeler's position in Newport, https://www.nytimes.com/1893/02/28/archives/mrs-wheeler-is-better-indications-are-favorable-for-her-recovery.html.

[16] *Sunday Herald* and *Weekly Natl Intelligencer*, April 26, 1885, 2.

[17] Clare Cushman, "The 'Lost' Clerks of the White Court Era," *Journal of Supreme Court History*, vol. 40, no. 1 (2015), 25–26. I am grateful to Matthew Hofstedt, Associate Curator of the Supreme Court, for this information. On York and his sad demise, see Todd Peppers' article, "The Supreme Court and the Curse of the Gypsy: The Tragic Case of Clarence Melville York," *Green Bag*, vol. 13, no. 2 (Winter 2010); on the C. M. Bell Photographic collection at the Library of Congress, https://www.loc.gov/rr/print/coll/c-m-bell-studio-photographs.html.

[18] Stephen Budiansky, **Oliver Wendell Holmes: A Life in War, Law, and Ideas** (New York: Norton, 2019), 8.

[19] On the elaborate social rituals Supreme Court wives maintained in Washington at this time, Clare Cushman, "Wives, Children…Husbands: Supporting Roles," *Journal of Supreme Court History*, vol. 36 (2011), 264–86.

[20] Charles Henry Butler, **A Century at the Bar of the Supreme Court of the United States** (New York: Putnam's, 1942, 164–64.

[21] The letter inviting the president can be seen online at: *Letter from Melville Weston Fuller to Theodore Roosevelt.* Theodore Roosevelt Papers. Library of Congress Manuscript Division: https://www.theodorerooseveltcenter.org/Research/Digital-Library/Record?libID=o39713. Theodore Roosevelt Digital Library. Dickinson State University.

[22] *Washington Herald*, January 10, 1907, 6.

[23] *Ibid.*

The Chief Justice and the Page: Earl Warren, Charles Bush, and the Promise of *Brown v. Board of Education*

Todd C. Peppers

Introduction

In late July of 1954, a Supreme Court announcement triggered headlines across the country. It was not the issuance of another ground-breaking opinion regarding the integration of public schools. Nor was it the news that an elderly Supreme Court justice was retiring. Instead, the Court notified the press corps that a fourteen-year-old Black student named Charles Vernon Bush had been hired to be one of four Supreme Court pages that Term. The Court had employed pages since the early nineteenth century: Their most visible duty was to sit behind the justices during court sessions, ready to provide court documents, legal books, and fresh water. But the pages also had significant duties behind the scenes, and their access to judicial chambers and case materials meant that these young teenagers were trusted with the Court's secrets.

The headlines made it clear that the hiring was newsworthy solely because of Bush's race. "High Court Gets 1st Negro Page Boy," reported the *New York Times*. "High Court Picks First Negro Page," echoed the *Washington Post*. "Negro Youngster is Supreme Court Page," stated the *Argus-Leader* (Sioux Falls). "Supreme Court Picks Negro Page," trumpeted the *Johnson City Press-Chronicle*. "Supreme Court Gets Negro as Page," announced the *Dothan Eagle*. "Negro Boy Named Page to Supreme Court by Warren," declared the *Fort Worth Star-Telegram*.

Many of the newspaper articles presented a similar set of basic facts, in part because local newspapers were reprinting wire service reports. Bush was not only "the

DOI: 10.1111/jsch.12286

When Chief Justice Earl Warren requested that the page program be integrated at the Supreme Court in 1954, he knew the larger consequences of hiring a Black page: that the Capitol Page School (class of 1947 pictured), the high school that educated Congressional pages, would be forced to integrate. The Court had just issued the *Brown* decision and would be hearing cases about its implementation that fall.

first of his race" to be "honored" with a page appointment, but he would also be the first minority to attend the Capitol Page School. It was reported that he was an honors student from Banneker Junior High School (a segregated junior high school) with an "easy grin" who was concerned about balancing his high school studies with his page duties; that he couldn't wait for the start of the basketball season; that his father was an academic administrator at Howard University; that he would earn more than 2,000 dollars a year, a substantial salary;[1] that the appointment was made by the Supreme Court Marshal's Office with "the approval" of Chief Justice Earl Warren; and that only four teenagers a year served as Supreme Court pages.

Only a few newspapers directly linked Bush's appointment to the recent decision in *Brown v. Board of Education*.[2] "Oddly," observed the *New York Times*, "this will be, in a way, the first implementation of the Court's ruling that segregation is unconstitutional."[3] In a subsequent editorial, the *Times* gave the Supreme Court lukewarm praise for finally integrating its page corps. "The court could hardly have done differently, although it did wait a long time…[b]ut we are making progress."[4] The *Washington Post* also drew the connection between the *Brown* decision and the Bush hiring, noting that the Supreme Court was "practicing what it preaches."[5]

What made Bush's appointment especially noteworthy, however, were its ramifications beyond the walls of the Supreme Court. Starting in the 1940s, all pages at the Supreme Court were required to attend the Capitol Page School in Washington, DC. Although the school was technically private, it had a contract with the District of Columbia to provide educational services for pages working at the Supreme Court and Congress, so it was considered a public school.[6] By hiring Bush, a Black teenager, to work at the Court, the Supreme Court was effectively requiring the Capitol Page School to immediately desegregate—thus becoming one of the first public schools in the country to implement *Brown*.

As with most news stories, the excitement over Bush's appointment quickly faded as reporters turned their attention to other events. No subsequent articles were published discussing Bush's experiences at the Supreme Court, although a small handful of newspapers noted Bush's graduation from Page School in 1957.[7] Nor have the many biographies on Earl Warren discussed how

the Chief Justice used the appointment of Charles Bush to integrate a public school as well as change the world inside the marble walls of the nation's highest court. The essay will attempt to fill in the historical record and show how a chief justice and a fourteen-year-old page took a small step in realizing the promise of *Brown*.

Charles Vernon Bush: The Origins of a Supreme Court Pioneer

Bush was born in Tallahassee, Florida, on December 17, 1939, to Charles H. and Marie Baker Bush. His father was a graduate of Morehouse College and a teacher at Lincoln High School in Tallahassee. In 1943 the family moved to Washington when his father took the position of educational director of Howard University's Clarke Hall. The younger Bush later recalled that his family lived at the university, referring to himself as a "campus brat."[8]

By all accounts, Charles was an exemplary student who consistently made his junior high school honor roll while juggling a host of extracurricular activities: captain of the debate team; member of the varsity basketball team and the spelling team; class treasurer; actor and director of school plays; recipient of awards in science competitions; member of the National Honor Society; member of the school newspaper's business staff. And he had a perfect three-year attendance record. Newspapers reported that the younger Bush was an active member of the All Souls Unitarian Church, held a paper route, and enjoyed stamp collecting and raising parakeets.[9]

In the spring of Charles' final year at Banneker Junior High School, the Supreme Court announced that the doctrine of "separate but equal" in the context of public school education violated the Fourteenth Amendment's Equal Protection Clause. Charles' initial reaction to *Brown* is unknown, but it is reasonable to assume that he understood the significance of the Court's decision. It is very unlikely, however, that Charles foresaw how the case would so dramatically and swiftly change his life.

The Supreme Court set up a public relations shoot in the summer of 1954 to photograph Charles Bush, an honors student from Banneker Junior High, with his family. His father (left), Charles Bush Sr., was an academic administrator at Howard University. Young Charles was unprepared and overwhelmed by the national coverage of his selection to be the first Black page.

Selecting a Supreme Court Page

Shortly after the Supreme Court announced that the segregation of public schools was unconstitutional, Court staffers—at the direction of Chief Justice Earl Warren—reached out to schools in the District of Columbia and asked them to recommend minority candidates for an open page position at the Court.[10] The Court had a long tradition of hiring young teenagers to work as pages, but the Court had never hired either a minority or a woman.

Out of a list of forty potential candidates, District of Columbia School Assistant Superintendent Harold A. Haynes forwarded five names to Supreme Court Marshal T. Perry Lippett. At least some of the five candidates were interviewed by Lippett, who recommended to Chief Justice Earl Warren that the Court hire fourteen-year-old Charles.

The Chief Justice undoubtedly understood the larger consequences of hiring a Black page, namely, that the Capitol Page School would be forced to desegregate by the fall of 1954.

In a 2007 interview with historian Daryl Gonzalez, Bush discussed how the Chief Justice pushed to integrate the Supreme Court pages. "His intent was to demonstrate to the world that the Supreme Court was indeed serious about the school integration decision. And that was important to him because the implementation hearings were occurring in the next [court] session."[11]

When Bush was notified by school officials that the Supreme Court was looking for a page, he had never heard of either the Capitol Page School, where Congressional and Supreme Court pages attended high school, or the Supreme Court page program. Other than knowing that the Court wanted a Black page, Bush recalled that he was told only one other important selection criterion: all new pages had to be short. "They [the pages] had four chairs behind the Supreme Court Justices, so they actually sat two on either side of the entrance in the rear of the Justices' rostrum," he explained. "And so they looked for someone who was relatively short, so they wouldn't tower over the Justices."[12] In fact, the height requirement dictated that the pages could not be taller than the shortest justice—who in 1954 was Felix Frankfurter, only five feet four inches tall.

While the height requirement was enforced at the time of hiring, by the 1950s pages were no longer transferred to other positions if they grew too tall. "That might have been a real tradition at one time, but really wasn't the rule when I was there," explains former page Robert Jacoby. He started as a Supreme Court page in October 1953, and, like many teenagers, he sprouted in height. "I grew to five foot ten inches in height during my years at the Court," recalled Jacoby. "They used that excuse [the height requirement] to be able to tell a kid it was time to go if it wasn't working out. They literally held that over your head."[13]

Bush's Reaction to the Selection

While Bush was "very much aware" of the historic nature of his appointment, he was not prepared for the wave of newspaper reporters who sat on the family's front porch, asked endless questions, and demanded photo shoots on the steps of the Supreme Court. "When I was selected, it was a major event," recalled Bush. "It was covered in the international media, all over the world. We were inundated with interview requests and information requests and I was an instant media personality." Not surprisingly, Bush was not ready to be "paraded around Capitol Hill and having my picture taken and [be] asked all sorts of intrusive questions" adding "[t]hat's a lot of pressure for a 14-year-old."[14]

Bush's parents tried to help their son with the strain of his new celebrity. "The thing that my parents . . . wanted to make clear to me was that I was still a little boy. And that I needed to be sure that I retained my sense of balance in the world, irrespective of all this attention."[15] At the same time, Bush's parents wanted to prepare Bush for his new position at both the Capitol Page School and the Supreme Court. "My parents counseled me on how I should comport myself," explained Bush. "They made me realize that I was a representative for the entire race and anything that I did or said would be reported around the world." Concluded Bush: "They thought I could handle it, and I did."[16]

While Bush and his parents struggled to adjust to the glare of the media spotlight, they felt neglected by the Supreme Court. "There was no real preparation by the Supreme Court folks to prepare us for what we were about to face," said Bush. "[W]e just coped."[17] This meant Bush and his parents went "where we were told to go" and participated in all interviews and photo shoots that the Supreme

Pages Vance Morrison, Robert Jacoby, Charles Bush and Stuart Polly in their traditional page uniform, which, unlike Congressional pages, included knickers.

Court staff scheduled for them. Looking back, Bush described the time period as "a blur."[18]

In 2007, Charles Bush gave a speech at his alma mater, the Air Force Academy, during which he shared some advice that his former junior high school teacher gave to her classroom of Black students:

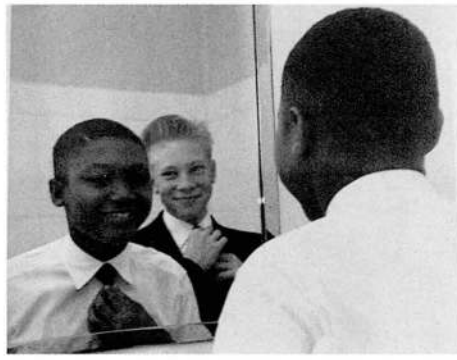
> [She] indelibly imprinted on the minds of us boys that we could take advantage of the outstanding education we were to receive or we could spend a future digging ditches. . . . She also made it clear that in the world we were entering, in order to compete with a white boy, for the same position, we would have to be two to three times as capable.[19]

Surely, those words must have motivated Bush as he broke racial barriers at both the Supreme Court and the Capitol Page School.

Charles Bush and the Capitol Page School

Bush entered the Capitol Page School in September of 1954, becoming the first minority student to integrate the District of Columbia's public school system. Bush later described attending the formerly all-white school as a "real shock" that was "exacerbated by the fact that I was torn away from anybody who was of my racial background."

Because of political patronage in the appointment of Congressional pages, combined with the power wielded by southern segregationists, many of the pages were drawn from the South. "There were some folks there [page school] that felt very strongly about their views, but interestingly enough a lot of them tended to be some of the slower guys and the more stupid of the crowd . . . folks that are always looking for someone to be better than," Bush stated. "And I've found



Behind the scenes at the Court: Charles Bush playing ping pong in the page locker room; Bush, Jacoby and Morrison changing in the page locker room; Bush and Jacoby putting on ties.

that frequently the case, so they really didn't bother me."[20]

Bush recalled that there was occasionally a "confrontation or a semi confrontation" at the school regarding race. One specific instance stuck with him:

> We used to have these breaks; I don't know if you still have them: the fifteen minute break in the day, where you got to go get a doughnut or something, a coffee? And I was coming back and everybody was gathered in the library. And the library was full and I walked in the door and one of the guys back in the corner from Georgia was telling this story about this black guy wearing these loud clothes. . . . And as I entered, everybody became aware that I was there and there was a very embarrassed silence about this semi-joke that he was telling at the expense of black people. But that is probably the only incident that really is indelibly imprinted upon my mind.[21]

Fellow Supreme Court page Vance Morrison recalled Bush's arrival at the Capitol Page School. "Charlie approached his new class mates with a quiet dignity and tried very hard to be friends with all if they wished," Morrison wrote. This "quiet dignity" was maintained in the face of student comments about Bush's race. "While he was not always treated well by many of us, he maintained the higher ground" and "earned the respect of all and made many friends."[22]

Former page Stuart Polly also described Bush as seeming more mature than his peers. "Charlie was the son of an educator, so he was more formal and polished than the rest

of us," said Polly. "Maybe weighed his words a bit more carefully."

Fellow page Jacoby remembered that Bush worked hard to "fit in" with the white pages. "I think that I was always friendly to Bush and very careful to not offend him," said Jacoby. "But when Bush wasn't there, some of the other pages were more likely to make little racial jokes (not about Bush, but in general) . . . [or have] the usual conversations about the differences between blacks and whites."

With the perspective of time and maturity, Jacoby wondered aloud if he could have done more to help Bush. "I feel troubled by the fact that this was a rare opportunity for me as a boy where I could have embraced him," explained Jacoby. "I wish I had reached out to him more outside of the court. . . . I regret that I didn't invite him to my neighborhood. Just to hang out. There was some awkwardness about how to socialize outside of the Court."

The Other Black Pages Who Followed Bush

Bush was almost joined by a second Black page in the fall of 1954. Frederick Jerome Saunders was a fellow classmate of Bush's at Banneker Junior High School. The Supreme Court originally believed that there would be two open page positions, and Saunders' name was also forwarded to the Court. When it turned out that only one position needed to be filled, Bush was hired. Saunders would attend Dunbar High School for a year before accepting a position in the Supreme Court library (a non-page position) and enrolling in the Capitol Page School.[23]

Saunders' hiring was not the subject of national headlines, although the *Washington Post* wrote a story on Saunders and his widowed mother's successful efforts to make sure that four of her older children earned their college degrees and went into teaching careers. "As the baby in the family," concluded the *Post*, "Fred is off to a good start in living up to the family standards."[24]

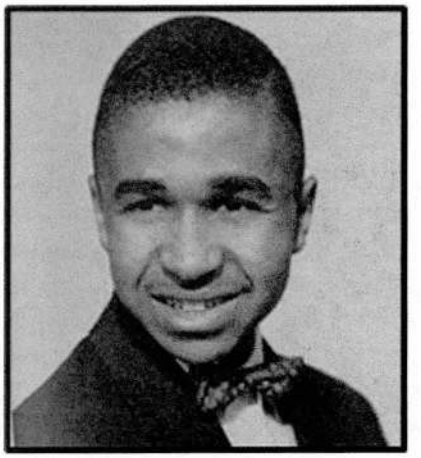
The second Black teenager to officially work as a page was Samuel Isaiah Williams, who started at the Court in the fall of 1957 (Bush had graduated the previous spring). Neither Saunders nor Williams felt the weight of integrating the Supreme Court page corps. "I think I did not feel the pressure . . . because my mother always instilled in me the confidence in myself to be successful in any task I undertook."[25] Saunders knew, however, that the decision by the Court to hire minority pages "'was important'" and "'would have a lasting effect after the *Brown* decision.'"[26]

Perhaps because he was not the pioneer, Saunders would have an easier time. "I just blended right in," said Saunders. "It seemed that people accepted me at both the Court and at page school. I didn't take any hits."[27] Saunders has especially fond memories of Helen Saunders (no relation), the Supreme Court librarian for whom he worked. "She embraced me like I was her child."

Saunders added, however, that he wasn't blind to the fact that powerful actors still supported segregation—such as some of the southern members of Congress. On a day when Congress was not in session, he accompanied a Congressional page he had befriended to that chamber and "made it my business to sit in Strom Thurmond's chair."[28]

Like Saunders, Samuel Williams—who started at the Supreme Court in the fall of 1957—did not feel singled out for discriminatory treatment. "I was conscious of being the only 'colored' page amongst four [Supreme Court Pages]—perhaps self-conscious is better, as I didn't want to have attention focused on me."[29] Despite this self-consciousness about race, Williams asserted that it was not triggered by external animus.

> I understood that there were differences in society. But while I was at the Court, I never felt different about one person than another. Maybe I was naïve at that time. When I was



Frederick Jerome Saunders was the second Black teenager to attend the Capitol Page school and served in the Supreme Court library. He went on to work for the Immigration and Naturalization Service and the United States Postal Service.

> there, even sitting with the other pages, I was shy and quiet. I never felt that I was different than the other pages. Even at Page School, I didn't notice racism. I never focused on it. I focused on the guys who were really friendly.[30]

While Saunders and Williams may not have noticed discriminatory attitudes from their white classmates, it is impossible to believe that racial animus disappeared from the Capitol Page School after Bush enrolled. Neither the House nor the Senate had integrated their page corps, and a firestorm of controversy erupted in 1959 when several House members attempted to hire a Black page (the Senate would not hire its first minority page until 1965). And while Williams was attending the Page School, a newly-enrolled white southern teenager—a young Virginian named Ludson Hudgins—left the school after learning that he would be taking classes with Black students. The son of a prominent segregationist, Hudgins told newspaper reporters "I haven't got anything against colored people, but I don't want to mix with them. It's just the principle of the thing."[31]

Working as a Supreme Court Page

Charles Bush started working at the Supreme Court on September 27, 1954. He would follow a rigid schedule for the next three years: Bush and his father would leave the Howard University campus at 5:30 a.m., and the elder Bush would drop Charles off at the Page School—located on the third floor of the Thomas Jefferson Building at the Library of Congress—by 6:15 a.m. Bush would attend classes until approximately 10:00 a.m., take the short walk from the Library of Congress to the Supreme Court, change into his distinctive page uniform, and begin his six-hour workday.[32]

The world that he entered in September of 1954 was bound by history and tradition—including a stratified socioeconomic structure based on race that "quickly became apparent" to Charles.[33] Bush explained:

> I was thrust not only into a white school but also into a white power structure at the court. There were layers of status, and the messengers and laborers, who were all black, were lowest on the totem pole. Pages are next to the law clerks on the totem pole, so we were treated with a great deal of respect. It was interesting, because suddenly folks who were accustomed to treating black people one way had to change.[34]

Bush stated that he did not face racial discrimination at the Court, in part because of the prestige of being a page. "There are only four pages on the Supreme Court . . . you're talking about a very small, elite group of little boys," explained Bush. "So, we were treated special because of who we were—our age and the fact that we were VIPs and we had a special relationship with the Justices and

with the administrators."[35] Bush conceded, however, that there was another reason why he was not subjected to discrimination. "They knew that if they differentiated between me and the other pages that it would be noted very quickly" and "it was very clear that no one wanted to cross the Chief Justice on that score . . . the Chief Justice was not somebody to screw with."

One group who enthusiastically welcomed Bush were the Black employees who worked at the Court. "The messengers and the janitorial staff were tickled pink that I was there because it was sort of a thumb in the eye of the folks there that differentiated between black and white being high or low."[36] Samuel Williams remembers a similar welcome. "The messengers [who at that time were all black] were so excited to see me because I was the second black page," Williams said. "The messengers gave me advice and told me, 'if you get upset about anything, talk to us.' They wanted me to be a success."[37] To Williams, the messengers were his "uncles."

Frederick Saunders also remembers being warmly accepted by the messengers, and he went out of his way to connect with the janitorial staff. "I would talk to the building cleaners every day," said Saunders, "[I] went down to the basement to see them." Saunders visits were more than merely social. "I wanted to show them that I didn't think that I was better than them." Saunders fondly recalled the "great camaraderie" that he developed with the cleaners.

The fact that Bush was assigned to work in the chief justice's anteroom provided another layer of protection from discrimination. Bush never knew if the assignment was a deliberate attempt to protect him, but it came with additional benefits: Bush was often one of the first staff members to greet the heads of state and powerful political actors who called on the chief justice. "I would be 'on deck' when these folks visited," Bush recalled. "And so, over the years, I got to meet or say 'hello' to a hell of a lot of chiefs of state."[38]

The interest that Chief Justice Earl Warren took in the lives of the pages is a consistent theme in reminiscences by former pages from the 1950s and 1960s. He always greeted the pages with a hearty "Good morning, boys" when he prepared to take the bench, and the Chief regularly talked with them about their academic studies. The relationship between the teenagers and Warren is perhaps best described by Samuel Williams, who recounted sitting down and talking about college with Warren:

> Chief Justice Warren talked with me about future educational opportunities. I was from a family of meager means and hadn't thought about going to college. He asked if he wanted to go to a service academy, and I told him that I wanted to be an electrical engineer. I felt so at ease with the Chief. It felt like talking to my grandfather. . . . I can't think of too many other people who instilled in me the value of getting an education than the Chief Justice.

Not all pages, however, quietly accepted the Chief's advice. Former page Ernest Wilson (1963–1966) recalls a lunch when the chief justice expressed his concerns about Wilson's involvement in a large number of high school extracurricular activities:

> I have a short attention span. At one point during one of these lunches, the chief says, "Wilson, I got a report from the school that you are doing all these activities. If you just buckled down and focus your energy, you could do much better." Answer: "Well, Mr. Chief Justice, that may be true, but I do a lot of interesting things. If I focused, I couldn't do all these interesting things."[39]

During this conversation, Warren's personal messenger—Alvin Wright Sr.—was serving lunch and looked askance at Wilson's retort.

Job Duties

As for the job duties of the pages, Bush explained that the teenagers "really worked" and had little time for homework when the Court was in session. Vance Morrison detailed their duties as follows:

> Tasks that all Court Pages accomplished included, on days when Court was in session, setting out quill pens for the attorneys arguing the case that day; paper, pens, ink, sharpened pencils for each Justice's desk on the Bench; and large bottles of commercial spring water in stands behind the bench with glasses and silver trays for water for the Justices when requested. Supplies were stored in an ante room behind the bench. As the Justices approached the Bench each morning and after the lunch recess, if needed, Pages helped them finish putting on their black robes and then, when the Crier called the Court to order, Pages held back the long, heavy drapes as the Justices proceeded together up the few steps to the Bench and to their seats. Pages also assisted as the Justices were seated.
>
> While Court was in session, the Pages sat quietly in small chairs on the Bench immediately behind the Justices and between the huge marble columns. When signaled by a Justice, they delivered notes, papers or books to and from the Justices and their offices—or each other—and brought them a glass of water or other items when requested. After a day's session ended in the late afternoon, Pages cleaned up the attorneys' and Justices desks, put everything reusable back into the Ante Room, changed into street clothes, and then took public transportation home for the evening.[40]

The second Black teenager to officially work as a page at the Court was Samuel Isaiah Williams, who started in the fall of 1957. He went on to earn his Ph.D. in Public Policy and served in both the public and private sector, including a stint in the Office of Management and Budget.

Seniority dictated what tasks the pages performed and where the pages sat in the Courtroom. The senior pages prepared the bench, while the younger pages prepared the counsel tables. And it was the senior pages who held the curtain for the chief justice and the two senior justices (the more junior justices enter the bench from side curtains). And while the Court was in session, the two senior pages sat to the audience's left and the two junior pages to the audience's right—thus placing the newer pages near the Marshal's desk, "where they could be more easily watched."[41]

Regardless of where they sat, the pages kept out a keen eye for a gesture or a quiet snap of a justice's fingers. In the 1970s, Chief Justice Warren Burger would instruct the pages: "[When the court is in session]

you should be like a quarterback who comes up behind the center and looks up and down the line. Your eyes should be doing that at all time—looking for gestures from the justices."[42]

When the pages were at the Court, they dressed in uniforms that harkened back to another era. They were required to wear a black double-breasted suit, a white shirt, black tie, long black stockings with knickers, and black shoes. The entire uniform cost about sixty dollars, and the pages were required to pay for the outfit. "The pants [cuffs] are either too tight or they're falling down," Robert Jacoby complained to the *Christian Science Monitor* in 1954.[43]

A few justices had their own unique requests for Court sessions. Justice Felix Frankfurter required freshly sharped pencils, cut down to four inches in length. Frankfurter would throw away the pencils at the end of oral argument. The Justice also wanted a steady supply of horehound candy and would only drink Poland Spring water—served at room temperature. William O. Douglas required a particular green ink for his ink well,[44] and he sent the pages to retrieve materials from the Library of Congress that Douglas used to write his books—often during oral argument. Finally, Hugo L. Black's chair—a combination of a swivel chair and a rocking chair—threatened the dignity of the Court. "We had to be careful pushing the chair behind him so he wouldn't land on the floor."[45]

When they were finished with a case book, the justices would hold the book at the side of their chair for the page to retrieve it. The sole exception was Justice Frankfurter, who would toss the book behind the chair without regard to whether the book landed in such a fashion as to bend its pages. This practice especially rankled Jacoby, who once received a lecture from Frankfurter on how to properly treat his own schoolbooks.

Although Frankfurter intimidated some of the pages, Bush—who considered Frankfurter to be "a genius"—was amused when Frankfurter did circles in his swivel bench chair. Bush also described Frankfurter as "querulous and probably the most talkative on the bench"—including engaging in a constant stream of comments with Black, who sat next to Frankfurter. Even as a teenager, Bush recognized that attorneys were unwise to anger Frankfurter. "If you got on his bad side as a lawyer [during oral argument], it was not fun because he was very, very bright and very, very interrogative."[46]

The first minority pages also had a front-row seat when civil rights cases appeared before the Court in the 1950s. Samuel Williams recalled hearing the "Little Rock High School" integration case (*Cooper v. Aaron*) argued in 1958. As controversial as the case was, it was Williams' presence in the Courtroom that made headlines in one newspaper. A few days after oral argument, *The Afro-American* ran a story with the headline "Colored Page Eased Thirst of Segregationist Advocate."[47] The first paragraph of the story reads as follows:

> As he argued earnestly before the Supreme Court, for two-and-a-half years of continued segregation at Central High School . . . the attorney for the Little Rock school board was handed a glass of water. The Supreme Court page who brought the water for the comfort of attorney Richard C. Butler was—ironically enough —a colored youth.

The article was accompanied with a picture of Williams, standing on the steps of the Supreme Court in the infamous page knickers.

Not all the memorable in-Court moments were serious. For Bush, the funniest memory involved Justice Sherman Minton—who Bush described as a "massive man from Indiana and a really nice guy" who had "the habit of napping on the bench." One

day during oral argument, the front rows of the gallery were filled by the members of a visiting high school band. Typically, the Court would ask the female band members who wore short skirts to wear an overcoat for the sake of decorum. But on this day, one of the female band members decided to remove the coat and thus expose the sitting justices to an inappropriate amount of flesh. As oral argument ended, Justice Minton awoke with a start, was startled by the display before him, leaned forward, and loudly said, "'God damn!' Really upset the Chief, it did," laughed Bush.

The pages' job duties continued when the Court was not in session. They would help in the Supreme Court library, retrieve books and other research materials from the Library of Congress, and sit outside the Conference room in case the justices required assistance. When not needed, the pages sat in a small room near the Supreme Court library and did homework. With the Court not being in session, the pages were permitted to deviate from tradition and wear regular pants instead of their trademark knickers.

Keeping the Court's work confidential was not systematically addressed. The only page who remembered getting a lecture on the importance of confidentiality was Charles Bush. "I was cautioned right after I got there," stated Bush. "[S]ome litigation was coming before the Court that dealt with General Motors and DuPont . . . it was pointed out to me that the information that was being considered [by the Court] could be very valuable to people who were dealing with the stock market." While Bush didn't understand the nuances of the case, he "did understand the overall strategic value of the information and how it might be used."

Interaction with the Justices

The pages grew to know and like most of their black-robed employers. "I remember remarking to my parents that I was surprised that justices—so high in the pecking order—were such nice people," explained Stuart Polly.[48] If the pages had held a popularity contest, Justice Tom C. Clark would have been the runaway winner due to his gregarious personality and tradition of giving the pages Christmas presents (usually ties) and tickets to the annual Army–Navy game. Other pages recall receiving cuff links from Justice Douglas during the holidays.

For Samuel Williams, it was Justice William J. Brennan who made the young man feel welcome at the Court. "Justice Brennan spoke to me every time he came on the bench," recalled Williams. "He seemed to go out of his way to speak to me. He was such an important person, but he was taking the time to talk to me." And the Justice's kindness made an impact on Williams. "Being the only African-American page up there on the bench, he made me feel very calm and relaxed."[49]

The Pages as Youngsters

Regardless of their solemn surroundings, and their professional relationships with the some of the nation's finest legal minds, the pages were youngsters and occasionally acted like it. Races up the Court's spiral staircase. Marathon ping pong games in the page locker room. Basketball games in the upstairs basketball court, sometimes including a young law clerk named William H. Rehnquist.

One tradition in the 1950s involved the long concrete tunnel that ran between the Supreme Court and the Library of Congress. Designed to be used to transport books and materials during inclement weather, the older pages would use the tunnel to put a scare into the new pages. Bob Jacoby explained:

> "As part of the initiation they [the older pages] brought John Calhoun [a fellow page] and I down to the

> tunnel. Told us that there were no lights. Told us that we had to walk through the tunnel while watching for old machinery. Then they [the older pages] would sneak ahead. We would be slowly walking, hanging on the wall, going slowly. Then they would turn on the lights at the end!"

A second, less elaborate trick was to send the new pages down the tunnel and turn off the lights when they reached the half-way point. Williams still recalled the tunnel as "a little scary."

Graduation from the Page Corps

Charles Bush and Frederick Saunders graduated from Page School in June 1957. As with previous years, graduation kicked off with a reception for the pages in the East Room of the White House, hosted by Mamie Eisenhower. On the evening of July 10, the formal graduation ceremony was held in the House Ways and Means Committee Room. There, twenty Capitol Page School seniors and their families were serenaded by the U.S. Navy Orchestra and listened to Senator Frank Church (D-Idaho) give the graduating address. On the following morning, the graduates assembled outside Vice President Nixon's office at the United States Capitol. They met with the Vice President and received presidential certificates signed by President Eisenhower (Nixon graciously offered to sign the certificates as well).

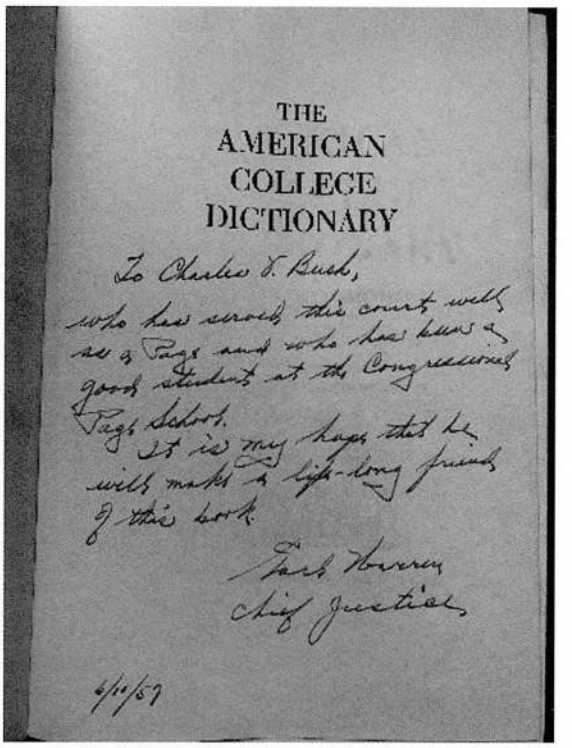
We don't know what Bush thought of his graduation ceremony, but fellow graduate Jacoby recalled an earlier graduation ceremony that featured a tardy junior senator named John F. Kennedy and an ad-libbed speech by Chief Justice Earl Warren. In the spring of 1954, Jacoby attended the ceremony because senior page Al Smith was graduating. Chief Justice Warren was invited to attend, and he sat with his wife in the front row. Senator Kennedy was the guest speaker, but was late. After the school principal made some small talk, and still no Senator Kennedy, she turned in desperation to the Chief Justice and asked him to give some brief remarks. "Warren nodded, got up, and gave an eloquent, off-the-cuff graduation speech," said Jacoby. Senator Kennedy arrived a few minutes into the speech, and the Chief Justice announced to the audience that the graduation speaker had arrived.

Kennedy gave a "very disjointed speech," recalled Jacoby (Stuart Polly described it as "terrible" and that the parents in attendance were upset with the junior senator from Massachusetts). "At the conclusion of the ceremony, my Dad commented that the chief justice gave a much better speech than Kennedy." Jacoby attended three additional graduation ceremonies, but Warren never returned—perhaps because he feared being pressed into speaker duties again.

Chief Justice Warren did not attend future graduation ceremonies, but he made sure to formally recognize the event. Each page was given a copy of the **American College Dictionary**. Their names were stamped in gold on the front cover, and each dictionary was inscribed by the Chief Justice. For Bob Jacoby, the Chief Justice wrote: "To Robert M. Jacoby, who has been a good student at the Congressional Page School. He has served this Court well. It is my hope that that he will make a life-long friend of this book." "As you can see from the enclosed pictures, I've used it frequently ever since," remarked Jacoby.

Subsequent Careers

At the time Charles Bush was selected to be the first Black page, his father told reporters that his son—who wanted to be an electrical engineer—might consider law school.[50] At the end of the day, however, Bush attended Howard University for two years before securing an appointment to the U.S. Air Force Academy. Bush would be "a



Chief Justice Warren inscribed this dictionary as a gift to Bush on his graduation and did the same for the other pages.

pioneer" at the academy as well, becoming its first Black graduate in 1963. He subsequently earned a master's degree in international relations from Georgetown University before serving in the Vietnam War in the late 1960s. Fluent in both Russian and Vietnamese, Bush rose to the rank of captain and served as the head of multiple interrogation teams.

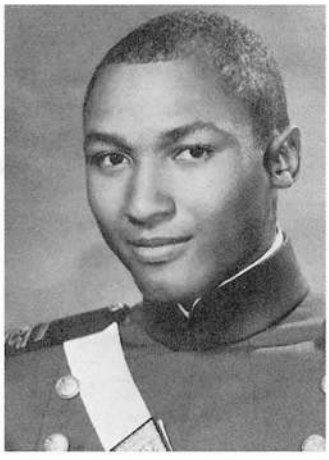
Shortly after graduating from the Air Force Academy, Bush married Bettina Wills. They raised three children. Bush subsequently left the Air Force, in part because he believed that racism inhibited a future promotion. He attended Harvard Business School and went onto a career as an executive officer for such companies as Max Factor, ICN Pharmaceuticals, and Hughes Electronics.

Charles Vernon Bush died of colon cancer in his Montana home on November 5, 2012, at age seventy-two. He was survived by his wife, three children, nine grandchildren, and two great-grandchildren—many of whom were at his side during the final hours of his life. His ashes are interred at the Air Force Academy.

Like Bush, Saunders and Williams also pursued non-legal careers. Frederick Saunders held multiple positions in the federal government, including with the Immigration and Naturalization Service and the United States Postal Service. Samuel Williams earned his Ph.D. in Public Policy and served in both the public and private sector, including a stint in the Office of Management and Budget. Although most of the pages did not go to law school, their time at the Supreme Court impacted their personal lives and professional careers. While serving as a page sparked Samuel Williams' interest in public policy, it did far more than that.

> Being a page was a singular experience to me. Being shy and quiet, it then gave me confidence in myself and my abilities. I could interact with persons of any stature. It helped me reach my full potential. Talking to the Chief Justice, talking to Justice Brennan, having Justice Clark smile at me—it gave me so much confidence in myself. Gave me the confidence that I could perform at any task... [as well as] the education, character, curiosity and sense of integrity for meeting life's challenges.[51]

Unfortunately, the "singular experience" afforded Charles Bush and Samuel Wilson is no longer available for a new generation of teenagers. In July of 1975, the Supreme Court announced that the century-old tradition of hiring high school students to serve as pages had come to an end; henceforth, the Court would only hire young adults (to be called "attendants") with high school degrees.[52] The Court did hire its first female page—Deborah Gelin—in the fall of 1972 before the program was terminated.



Bush went on to become the first Black graduate of the United States Air Force Academy in 1963. He subsequently earned a master's degree in international relations from Georgetown University before serving in the Vietnam War. Fluent in both Russian and Vietnamese, Bush rose to the rank of captain. He later attended Harvard Business School and went on to a corporate career.

Conclusion

In October Term 1954, the Supreme Court heard oral arguments regarding the implementation of the *Brown* decision. The resulting opinion is commonly referred to as "*Brown* II."[53] In his unanimous opinion, Chief Justice Earl Warren ordered local school districts to desegregate their schools "with all deliberate speed." Supporters of immediate integration were dismayed by the vague language, which ultimately allowed southern states to use a variety of tactics to deliberately evade and resist the Court's mandate that public schools be desegregated.

What has been forgotten in the discussion of *Brown* II and the "all deliberate speed" standard is that Chief Justice Warren himself forced a public school to desegregate within months of the first *Brown* decision. He achieved this feat not through a court order, but by the hiring of Charles Bush. And Bush, in courageously accepting the challenge of being the first minority page, helped the Court take its first tentative step in fulfilling the promise of *Brown v. Board of Education*.

Author's Note: This article could not have been written without the help and participation of many people. That includes Jerry Papazian (President of the U.S. Capitol Page Alumni Association), Franz Jantzen (Collections Manager for Graphic Arts, Supreme Court Curator's Office), and Matthew Hofstedt (Associate Curator). Darryl Gonzalez (author of **The Children Who Ran Congress: A History of Congressional Pages**) kindly shared his interview notes with Charles Bush. I was fortunate to interview Bettina Bush (widow of Charles Bush), and former Supreme Court pages George Hutchinson, Vance Morrison, Robert Jacoby, Stuart Polly, Frederick Saunders, Samuel Williams, Ernest J. Wilson III, and Hunter R. Clark. I also want to thank Clare Cushman,

Chad Oldfather, Charles Peppers, and Susan Stein for reading earlier versions of this article.

Todd C. Peppers holds the Fowler Chair in Public Affairs at Roanoke College and is also a visiting professor of law at the Washington and Lee School of Law.

ENDNOTES

[1] According to the U.S. Department of Commerce, Bureau of the Census, the median family income for a Black family in 1955 was around 2500 dollars a year.

[2] 347 U.S. 483 (1954). On the same day that the Supreme Court issued its *Brown* decision, the Court held that segregation in District of Columbia schools was unconstitutional. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

[3] "High Court Gets 1st Negro Page Boy." *The New York Times*, July 24, 1954. See also "Supreme Court Follows Through." *Southern Illinoisan*, July 27, 1954; "Implementing a Decision." *Time*, Vol. 64, Issue 5 (August 2, 1954): 13.

[4] "Photo Significant." *Ventura County Star-Free Press*, July 30, 1954 (reprinting *New York Times* editorial).

[5] "High Court Picks First Negro Page, Honor Graduate of Banneker School." *The Washington Post*, July 24, 1954.

[6] Vance Morrison. "History of the Supreme Court Page Program." U.S. Capitol Page Alumni Association News (undated); Daryl Gonzalez, **The Children Who Ran Congress: A History of Congressional Pages** (Praeger 2010): 131–32.

[7] "History Is Made in U.S. Capitol." *Pittsburgh Courier*, June 22, 1957; "Capitol Page School, for First Time, Graduates Two Race Youths." *Alabama Tribune*, June 21, 1957; "Capitol Page Boys Discover Vacation Still Not Started." *Wilmington News-Journal*, June 18, 1957.

[8] Darryl Gonzalez July 24, 2007 interview with Charles Bush.

[9] "Negro Page Boy for High Court." The *Pittsburgh Courier*, July 31, 1954; "Supreme Court Names First Negro Page Boy. *Jet* Vol. 6, No. 13 (August 5, 1954): 4."

[10] "High Court Picks First Negro Page, Honor Graduate of Banneker School." *The Washington Post*, July 24, 1954.

[11] Gonzalez interview. The Court's opinion on implementation is commonly referred to as "Brown II" and was issued in 1955. 349 U.S. 294 (1955).

[12] *Ibid.*

[13] Author's May 21, 2020 interview with Robert Jacoby.

[14] Gonzalez interview.

[15] *Ibid.*

[16] Lindsay, "Decision that Changed Everything."

[17] Gonzalez interview.

[18] Supreme Court Curator's Oral History Project. April 3, 2008, Interview with Charles Bush.

[19] Emily Langer. "Charles V. Bush Dies at 72, First Black Supreme Court Page." *The Washington Post*, November 29, 2012.

[20] *Ibid.*

[21] *Id.*

[22] Vance Morrison. "In Memorium: Charles V. Bush (Supreme Court '56)." *The Capitol Courier: US Capitol Page Alumni Association* Volume 4, Issue 1 (December 2013): 6.

[23] Author's June 3, 2002 interview with Frederick Saunders.

[24] Jean White. "Capitol Page with a Tradition." *The Washington Post*, November 11, 1955.

[25] June 12, 2020, correspondence between Samuel Isaiah Williams and the author.

[26] Marcie Sims. **Capitol Hill Pages: Young Witnesses to 200 Years of History** (McFarland, 2018): 168.

[27] Saunders interview.

[28] *Ibid.*

[29] Samuel Isaiah Williams. "My Courtside Seat to a Changing Society." *The Capitol Courier: US Capitol Page Alumni Association.*

[30] Author's May 22, 2020, interview with Samuel Isaiah Williams.

[31] Frank Van Der Linden. "Virginia Youth Quits Capitol Page School." The *Greenville News*, March 5, 1959. See also "Three Negros in Page School: Virginian Quits." *The St. Louis Dispatch*, March 6. 1959; "Page Balks at Integration." *The Fort Worth Star-Telegram*, March 6, 1959.

[32] "Negro Boy Begins Job as Supreme Court Page." The *New York Times*, September 28, 1954.

[33] Gonzalez interview.

[34] Lindsay, "Decision that Changed Everything." See also Robert Fabrikant. "From Warren to Burger: Race Relations Inside the Supreme Court." *Mitchell Hamline Law Review Sua Sponte*, vol. 43, No. 6 (2017): 1–8.

[35] Gonzalez interview.

[36] *Ibid.*

[37] Author's May 22, 2020, interview with Samuel Isaiah Williams.

[38] Gonzalez Interview.

[39] Author's May 31, 2020, interview with Ernest J. Wilson III.

[40] Morrison, "History."

[41] May 27, 2020, correspondence between Robert Jacoby and the author.

[42] Clark interview.

[43] Don Stirling Raymond. "Top Court Keeps Pages in Knickers." *The Christian Science Monitor*, June 7, 1954.

[44] Morrison, Polly, and Williams interviews.

[45] Williams interview.

[46] Gonzalez interview.

[47] "Colored Page Eased Thirst of Segregation Advocate." *The Afro-American*, September 27, 1958.

[48] Polly interview.

[49] Williams interview.

[50] "Negro Page Boy Sets Precedent." *The York Dispatch*, September 28, 1954.

[51] Author's interview and correspondence with Williams.

[52] "Supreme Court Tears a Page Out of History." *The Sacramento Bee*, July 14, 1975; Matthew Hofstedt. "Afterward: A Brief History of Supreme Court Messengers." *The Journal of Supreme Court History*, vol. 39, no. 2 (July 2014): 259–63.

[53] 349 U.S. 294 (1955).

Earl Warren's Last Stand: *Powell v. McCormack*, Race, and the Political Question Doctrine

Olivia O'Hea

Chief Justice Earl Warren had great expectations for *Powell v. McCormack*.[1] According to his clerks, the Chief believed the case would be his swansong.[2] He hoped the opinion would become an illustrious historical document, revered as canonical by future constitutional scholars.[3] To Warren's credit, the case contained all the trappings of a great constitutional showdown. At its center: the gregarious Congressman Adam Clayton Powell, who was formally excluded from his seat after allegations of mismanaging funds.[4] And the question—who had the power to unseat a fairly elected congressman?—highlighted the escalating tension between Congress and the Court.[5] In a jab at the Court, the House report recommending Powell's sanctions noted that the final vote would be immune to judicial review.[6]

By the time the Supreme Court granted cert, New York's 18th Congressional District had reelected Powell, and by the time the justices heard the oral argument Powell was sworn in to the 91st Congress. The case was essentially moot. And yet, Warren remained undeterred. One of his clerks hypothesized that Warren took the case because of the overt racial implications of excluding a congressman nicknamed "Mr. Civil Rights."[7]

Handsome and charismatic, Adam Clayton Powell was a Baptist pastor elected to Congress from Harlem, New York, in 1944.

DOI: 10.1111/jsch.12292

Another stated that the Chief simply believed Congress "shafted" Powell.[8] Many scholarly works discuss the case's mitigation of the political question doctrine, but they do not theorize why Warren took this hyper-political, likely-moot case.[9]

This author posits that Warren avoided the persuasive reasons not to hear *Powell v. McCormack* because he believed Congress excluded Powell because of his race and civil rights advocacy. The respondents' brief paid little attention to the clear inferences of racism in Powell's exclusion, and when the issue was discussed at oral argument, the respondents' advocate, Bruce Bromley, failed to assuage Warren's concerns about impermissible racial discrimination. Mitigating the political question doctrine in separation-of-powers cases was the price Warren was willing to pay to remedy this discrimination. Despite the Chief's altruistic motivations for this case, and despite the sacrifice he made to the political question doctrine for these motivations, his great expectations for *Powell v. McCormack* fell flat. As one clerk acknowledged, the decision "[has] not been the source of constitutional wisdom we thought it might be."[10]

The Political Rise and Fall of Representative Adam Clayton Powell Jr

Auspicious Beginnings: The House's New Civil Rights Star

Born to a prominent Baptist preacher who led the nation's oldest African American church, Representative Adam Clayton Powell's time in the public eye began well before his election to the 79th Congress. At just twenty-two, Powell became an assistant pastor at his father's church, and by the late 1930s, he was one of the most prominent political figures in Harlem. In 1944 he ran for Congress unopposed, and when Congress convened in 1945 he was escorted to the House Chamber by the only other Black representative, William Dawson.[11] Dawson and Powell remained the only Black representatives until 1955. During Powell's first years as a Representative, he sponsored several pieces of civil rights legislation, including a bill prohibiting segregation in interstate travel.[12]

However, as Powell's tenure in Congress lengthened, so too did his list of run-ins with D.C.'s political elite. He once took the House floor to say of a fellow congressman, "The sooner [Representative] Martin Dies is buried, the better. . . . There is only one place fit for him to live and that's Hitler's outhouse." Another time, he referred to First Lady Bess Truman as "the Last Lady" because she attended a Daughter of the American Revolution event after the organization refused to let Powell's wife use one of its facilities. Yet another time, Representative Cleveland Bailey (D-WV) punched Powell in the jaw, claiming Powell was attempting to undermine his rider on a bill. When asked to comment on the matter, Powell genially replied, "Cleve Bailey and I smoke cigars together, and are old friends." *The Baltimore Afro-American* columnist Irwin Ross recounted Powell's "dexterity in getting his foot into his mouth," before concluding "His proposals may be flamboyant and impractical, but he has made himself a vehicle of genuine protest. The more responsible leaders of the colored community are left to pick up the pieces."[13]

Powell initially served on the Indian Affairs, Invalid Pensions, and Labor Committee, which later merged with the Education Committee to create the Committee on Education and Labor. While the Committee on Education and Labor had a modest budget and minimal impact during the 1940s and 1950s, it grew substantially during the 1960s.[14] In 1961, Powell advanced to chairman of the Committee on Education and Labor, making him the one of the most powerful Black congressmen whose committee could direct billions in funding.[15] As chairman he pushed through more than fifty progressive

Powell (left) was named chairman of the House Education and Labor Committee in 1964 and proved extremely effective at enacting education and social programs under presidents John F. Kennedy and Lyndon B. Johnson (right).

measures,[16] but by 1966 murmurings began amongst the committee's members that Powell "was using the Committee as a backdrop for demagogic posturing, especially when he associated himself with the . . . frightening 'Black Power' movement."[17]

In September 1966, a group of Committee on Education and Labor members alleged Powell misused travel funds and employed his wife as a clerk even though she lived in Puerto Rico.[18] The Special Subcommittee on Contracts of the Committee on House Administration investigated these claims throughout December 1966, and it recommended the cancellation of Powell's airline credit cards.[19] After this recommendation, but before the commencement of the 90th Congress, the Democrat Members-elect met in caucus and voted to strip Powell of his chairmanship.[20] A note to Representative Emanuel Celler (D-NY) from an aide reveals that after this vote, there was "movement on foot not to seat" Powell in the upcoming 90th Congress.[21]

The Celler Investigation: Powell Finds Himself the Target of a Second Congressional Investigation

When the 90th Congress met to organize on January 10, 1967, Representative Lionel Van Deerlin (D-CA) requested that Powell step aside while the oath of office was administered. He expressed concern over Powell's mismanagement of congressional funds, charges he faced in New York courts for a libel lawsuit, and the effect of these lawsuits on the public image of Congress. Representative Gerald Ford (R-MI), who would become president just a few years later, proposed an amendment creating the Select House Committee to Investigate Representative Adam Clayton Powell (the Committee). This amendment prohibited Powell from being sworn in or seated until the Committee issued its report. This resolution passed, and Powell found himself at the center of a second congressional investigation.[22]

The bipartisan Committee was chaired by Representative Emanuel Celler (D-NY), and its members included Representative James Corman (D-CA), Representative Claude Pepper (D-FL), Representative John Conyers (D-MI), Representative Andrew Jacobs (D-IN), Representative Arch A. Moore (R-WV), Representative Charles M. Teague (R-CA), Representative Clark MacGregor (R-MN), and Representative Vernon W. Thomson (R-WI). Interestingly, Celler was a fellow New Yorker who garnered a reputation as a civil rights champion for his role in the passage of the 1964 Civil Rights Act. When asked how he felt about investigating a prominent Black leader, Representative Celler replied, "As a good soldier, I am willing to take on the task," but followed up, "I am entitled to commiserations, not congratulations."[23]

The Committee was authorized to hold hearings, compel witnesses, and subpoena documents on Powell's age, citizenship, and inhabitancy, the status of his New York legal proceedings, and "matters of Mr. Powell's alleged official misconduct since January 3, 1961." It held hearings on these issues on February 8, 14, and 16, 1967. Powell appeared at the first hearing with his attorneys, many of whom were repeat players in civil rights litigation. Powell was represented by Robert L. Carter, Arthur Kinoy, William M. Kunstler, and Herbert O. Reid Sr., among others.[24] Powell and his attorneys first moved to limit the Committee's inquiry to his age, citizenship, and inhabitancy, arguing Article I, Section 2, Clause 2 makes these the exclusive qualifications for House membership. When the Committee rejected this suggestion, Powell did not attend the hearing on February 14 or 16.[25]

On February 23, 1967, the Committee issued its report. Its findings included the following: Powell met the qualifications established in the Constitution; he wrongfully diverted House funds as a Committee chairman; and he made false expenditure reports to the Committee on House Administration. The Committee's proposed resolution included seating Powell, but also recommended a public censure, a $40,000 fine, and a loss of seniority.[26]

Celler demanded all Committee members sign the report, but it certainly did not enjoy unanimous support. Conyers, the lone Black member of the Committee, advocated against the removal of Powell's seniority and the fine, arguing that prior cases of member misconduct resulted in a censure at most.[27] Conversely, Pepper made it known to Capitol Hill reporters that he favored full expulsion for Powell.[28]

On March 1, 1967, the Committee presented its report and proposed resolution, H. Res. 278, to the House. Although leaders of both parties backed the recommendations as constitutionally sound and appropriate, many members remained skeptical that Powell would appear to take the oath. They theorized the public censuring would insult Powell,[29] and indeed, Powell did not appear in the House that day. House members rejected a motion to bring H. Res. 278 to an immediate vote.[30]

The House then extensively debated Powell's fate, and Congressmen tiptoed around the allegations that the investigations and sanctions were racially motivated. Representative Charles E. Wiggins (R-CA) dismissed the allegations as "nonsense," while Committee member Moore attempted to assure the House, "We never considered Adam Powell as an American Negro." But it was the speech of Representative Elmer J. Holland (D-PA) that addressed racism directly:

> There is some reason, surely, that the Powell case alone has given rise to such dramatic punishment. I find it impossible to shake the conviction that a large part of the intense public campaign against Mr. Powell stems from the fact of his race . . . This subject left no doubt in my mind

By the mid-1960s, Powell was criticized for mismanaging his committee's budget, taking trips abroad at public expense, and missing meetings of his committee. In January 1967, the House Democratic Caucus, under Chairman Emanuel Cellar (D-NY), stripped Powell of his committee chairmanship. Above Powell is confronted by members of the press during the investigation.

> that it was largely motivated by the notion that a Negro Congressman ought to be more circumspect, more humble, and more "grateful" than his white colleagues need to be.[31]

The debate continued after Holland's impassioned speech, and eventually Representative Thomas Curtis (R-MO) offered an amendment to H. Res. 278 that would exclude Powell and declare his seat vacant.[32] The amended resolution passed by a vote of 307 to 116, and Powell was excluded from Congress.[33]

Shortly after his exclusion, Powell held a press conference from the steps of his Bahamian vacation home where he announced he would sue to regain his seat in Congress.[34] As a battle between the judiciary and the legislative branch loomed, words from Celler's Committee report became even more prescient: "[A]ction by the House punishing the Member-elect by censure and fine after he is seated is immune to judicial review."[35] Celler openly urged the federal judiciary not to hear the case. He gave interviews on the matter and stated these interviews were "candidly an attempt to influence the courts, [which] he had a right to do because the issue was no ordinary lawsuit but was a conflict that went to the roots of a government built on separation of the legislative, executive and judiciary powers."[36] Despite this commitment to the House's authority, Celler also

In March 1967 Powell held a press conference from his home in the Bahamas and introduced four of the eight attorneys who would work on his case to regain his House seat. From left: Herbert Reid, William M. Kunstler, Powell, Frank Reeves, and Arthur Kinoy.

publicly admitted that "there was an element of racism in the vote in the House that rejected the resolution which I as chairman of the Select Committee offered."[37] Although Celler may not have realized it at the time, his statements captured the two key themes of the impending litigation: separation of powers and race.

Lower Courts Debate *Powell v. McCormack*: A Question of Jurisdiction or Justiciability?

Powell and thirteen electors of New York's 18th Congressional District sued Speaker of the House John McCormack and other congressmen for injunctive relief, mandamus, and declaratory judgment in the District Court for the District of Columbia. Powell argued he met the age, citizenship, and inhabitancy qualifications detailed in Article I, Section 2, Clause 2, and that these qualifications were the exclusive tests for House membership under Article I, Section 5, Clause 1.[38] The plaintiffs also raised the following arguments: House Resolution 278 subjected the electors of New York's 18th District to discrimination based on race and color in violations of the Fifth, Thirteenth, and Fifteenth Amendments; House Resolution 278 constitutes a bill of attainder, an ex post facto law, and cruel and unusual punishment; and House Resolution 278 violated Powell's procedural due process guarantee and the Sixth Amendment.

The District Court held the doctrine of separation of powers precluded subject-matter jurisdiction. Writing for the court, Judge George L. Hart found the separation of powers concerns presented a jurisdictional, rather than justiciability, issue. He warned that federal court intervention would "crash through a political thicket into political quicksand." The court dismissed the case.[39]

While the Court of Appeals for the District of Columbia Circuit arrived at the same conclusion, it did so on different grounds. It held that federal courts had jurisdiction over this claim, and that the separation of

powers issue raised by the District Court was a question of justiciability, not jurisdiction.[40]

An opinion by then-Judge Warren Burger concluded Powell's claim did not lack subject-matter jurisdiction under a *Baker v. Carr*[41] analysis, because the case arose under the Constitution through a broad jurisdictional grant in Article III; it presented a case or controversy based on *Bond v. Floyd*,[42] a Warren Court case that found federal jurisdiction over a contested state legislature seat; and 28 U.S.C. § 1331(a) gave the District Court original jurisdiction over civil actions, which provided an affirmative statutory grant of jurisdiction.[43]

However, Burger also found three justiciability issues under *Baker*'s six-factor political question test. First, federal courts do not "possess the requisite means to fashion a meaningful remedy"; second, the case presented a "lack of respect due coordinate branches of government"; and third, if the court invalidated a House Resolution, "the potential for embarrassment is rather obvious."[44] These issues suggested the case presented a nonjusticiable political question and weighed against court intervention.

Burger concluded his opinion by condemning any judge who was "either so rash or so sure of their infallibility as to think they should command an elected co-equal branch in these circumstances." Concurring opinions from Judge Harold Leventhal and Judge Carl McGowan bolstered Burger's scathing critique, with McGowan concluding "Our already overtaxed courts arguably have more pressing work to do than this, including the hearing and determination of serious and substantial claims of deprivations of civil rights."[45]

To Moot or Not to Moot: *Powell's* Path to the Supreme Court

Court Considers Certiorari with Emphasis on Race and Political Question Doctrine

Powell's petition for certiorari stated that he met all of the qualifications for House membership established in the Constitution, and his exclusion violated the Thirteenth, Fourteenth, and Fifteenth Amendments rights of his majority Black constituents. Using legislative history, the petition claimed the Framers did not intend for the legislature to alter, add to, vary, or ignore the constitutional qualifications for membership in either House. And while the lower courts declined to address Congress's alleged racial animus, the cert petition argued there was a, "Serious question as to whether the petitioner's rights as a Negro citizen, and the rights of the approximately 400,000 negro citizens residing in the 18th Congressional District of New York to the freedom and equality guaranteed to them by the Wartime Amendments have been violated."[46]

Respondents' memorandum in opposition to certiorari argued that the D.C. Circuit correctly applied *Baker* and reiterated the three *Baker* factors identified by Burger. However, the memorandum claimed a fourth *Baker* factor also counseled against court intervention. Respondents argued that the case involved a "textually demonstrable" commitment to a coordinate branch through Article I, Section 5, which permitted Congress to judge the qualifications of its own members. Not only did respondents' memorandum fail to address Powell's allegation of racial discrimination, it actually alleged the motivations of this case were purely to boost Powell's candidacy in his election for his former seat. This memorandum was the first example of respondents' failure to meaningfully engage in the allegations of racism tainting this case, but it would certainly not be the last.[47]

A memo from Justice William O. Douglas's clerk Peter Westen prepared in advance of the cert vote identified one of the case's primary claims as the argument that, "expulsion deprives Negro members of petitioner's constituency the rights guaranteed by the 13th, 14th, and 15th amendments." This suggests that the justices considered race when granting cert, which Warren clerk Scott Bice later confirmed.[48] "That was the biggest case

When seven of the Warren Court justices voted to grant cert (Thurgood Marshall (standing at right) and Potter Stewart (standing second from left) voted to deny), the press saw the case as a showdown between Congress and the judiciary.

for the Chief that year because, again, it had a confrontation with Congress, it had the racial overtone to it," he recalled. Westen identified the political question doctrine issue, but he did not offer a formal recommendation on whether the case presented a justiciable question. He did suggest that D.C. Circuit's finding that this case would "embarrass" Congress was not necessarily correct, and he suggested Douglas look further into the merits of this argument. Westen also highlighted for Douglas that the Memorandum in Opposition to granting cert and the D.C. Circuit quoted Douglas's footnote in *Baker v. Carr*, which stated "Of course each House of Congress, not the Court, is the 'Judge of the Elections, Returns, and Qualifications of its own Members.'"[49]

In evaluating each of the respondents' arguments, Westen found the most compelling argument was that the case may become moot. H. Res. 278 only excluded Powell from the 90th Congress, which could terminate before the Court could issue its opinion. Westen suggested the Court move quickly if it wanted to hear this case. He recommended Douglas only vote to grant cert if the Court could decide the question before the new session of Congress began, because "There is no sense reaching out to embarrass Congress in a way that has no impact on the parties." By the time the Court considered whether to grant cert, Powell already won the Democratic nomination in the primary for his former seat.[50] Thus, in Westen's estimation, the Court had only a few short months to grant cert, hear the case, and issue an opinion before Powell, the predicted winner of the general election, was sworn in to the 91st Congress and the case became moot.[51]

Douglas' notes reveal nearly all of the justices voted to grant cert. Justices Abe Fortas, Byron White, William J. Brennan, John M. Harlan, Hugo L. Black, William O. Douglas, and Chief Justice Warren voted to grant cert, while only Justices Thurgood

Marshall and Potter Stewart voted to deny.[52] After the Court granted cert, the media seized on the showdown between Congress and the judiciary. The *Chicago Defender* wrote that "The case could provoke another clash between the legislative and judicial branches of government, already at odds over the Senate's refusal to confirm President Johnson's appointment of Justice Abe Fortas as Chief Justice."[53] Other sources questioned why the Court took this case at all, concluding "the United States Supreme Court is risking much for ostensibly little."[54] Congress also reacted quickly. According to one Capitol Hill reporter, Congressmen flew back to D.C. to conference on how to oppose the Court's action.[55] As the ramifications of the Court's decision to grant certiorari rippled through Congress, the Court itself prepared for the next stage of the case: the briefs.

Marbury's Shining Moment: The Merits Briefs and Moot Memorandum

By the time the Court granted certiorari on November 18, 1968, Powell was reelected to his former seat. Although whispers filled the halls of Capitol Hill that some members would attempt to block his swearing in, all signs indicated that Powell would once again represent the people of the New York's 18th Congressional District. Indeed, on January 3, 1969, he was sworn in.[56]

But his return was not entirely harmonious: After his swearing in, the House voted to strip Powell of his seniority and punish him with a $25,000 fine.[57] Designed as a compromise between those who called for Powell's total exclusion and those who called for his swearing in, the sanctions reflected the original recommendation of the Special Committee investigating Powell in the 90th Congress. Celler, who chaired that Committee, opposed the sanctions, believing they would provide the Supreme Court with even more reason to side with Powell. He warned his colleagues, "We have no right to do that, and I am certain the Supreme Court when it makes a decision on Adam Clayton Powell will so decide."[58] Celler's warnings fell on deaf ears. Congress voted for the sanctions, and, just down the road, the Supreme Court case continued to move forward. On January 6, 1969, just days after Powell was sworn in to the 91st Congress, his attorneys filed their merits brief with the Supreme Court.

The petitioners' brief advanced several arguments tied together by a unifying thread: Congress's exclusion of Powell was racially motivated, and only the Supreme Court could remedy that racism. Spanning an impressive 193 pages, the brief's very first sentence of argument invoked strong judicial supremacy themes by citing *Reynolds v. Sims*[59] and *Baker v. Carr* for the proposition that the Court could decide this fundamental question about America's political system. It then progressed into an extensive recitation of legislative history to demonstrate that the Constitution contained the exclusive qualifications for House membership, including statements from the Framers on the right of people to "choose whom they please to govern them."[60]

In addition to legislative history, the brief relied on three key Supreme Court precedents: *Reynolds v. Sims*,[61] *Baker v. Carr*,[62] and *Marbury v. Madison*.[63] It cited *Marbury* no fewer than forty-seven times to support a variety of judicial supremacist arguments, including that the United States is "a government of law and not of men," that it was the duty of the judiciary to "say what the law is," and that "the powers of the legislature [were] defined and limited." Powell's attorneys also used *Reynolds* to argue that excluding Powell denied his constituents the right to representative government and the right to vote for the candidate of their choice. Notably, the brief failed to engage in a full, six-factor *Baker* analysis, but instead dismissed the political question doctrine concerns by arguing the lower courts invoked the doctrine to "remove

the 'power of the courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison*.'"[64]

Perhaps most significantly, the brief alleged racism motivated Powell's exclusion, which violated the Thirteenth, Fourteenth, and Fifteenth Amendments. The brief argued that because Congress knew Powell would be reelected even if he was excluded, the only objective of this exclusion could be to deny Powell and the majority Black constituents of the 18th District equal rights. Statements from Representatives Holland and Celler attributing Powell's exclusion to racism bolstered this argument. The brief also provided excerpts from a *New York Post* article where many Black leaders stated that Powell's exclusion denied the 18th District the right to choose its own representative. It labeled this disenfranchisement a badge and indicia of slavery reminiscent of *Dred Scott v. Sanford*,[65] and the brief concluded, "If there is one question which we would have thought wholly settled in this Court it is that the judicial power of the United States is always available to remedy discrimination by any branch of the government, state or federal, against citizens by reason of their race."[66] This strategic call to action identified the issue—racism—and the remedy—judicial supremacy—in one fell swoop.

On January 11, 1969, the respondents again attempted to dismiss this case as moot. They filed a memorandum that said because the 90th Congress officially ended and because Powell was sworn in to the 91st Congress, the case failed to present a controversy. Since the primary relief Powell sought was his seat in the 90th Congress, all that now remained of his case was a claim for back pay, which was better suited for the Court of Claims. Powell also sought declaratory relief for his loss of seniority, but the respondents argued it was within Congress's sole discretion to grant or remove seniority.[67]

Douglas's clerk Peter Westen drafted a memorandum for the justices summarizing the mootness argument. Without offering a recommendation on the merits, Westen highlighted the petitioners' two responses to mootness: (1) the issue of back pay rested on a determination that exclusion was improper, which was a threshold question of law for the Court, and (2) Powell's $25,000 fine was improper because it stemmed from his unconstitutional exclusion.[68] Ultimately the Court rejected respondents' mootness argument. Perhaps if Congress heeded Celler's warning and abandoned the $25,000 fine, the Court would be forced to recognize the case as moot. However, Warren already thought Congress "shafted" Powell,[69] and the sanctions imposed by the 91st Congress, on top of the original exclusion, likely only affirmed that belief. Thus, the case moved forward.

Having failed in their attempt to dismiss the case as moot, the respondents filed their merits brief on March 17, 1969. It relied heavily on the confrontation between the judiciary and legislative branch, warning against "the profound and disturbing implications that such a confrontation would entail." Respondents' weaponized *Marbury* and *Youngstown* against the petitioner to argue that just as the Court would strike down an attempt by the legislature to expand judicial power beyond Article III (*Marbury*) or an attempt by the Executive to intrude on the Legislative branch (*Youngstown*), so too should the Court recognize the limits of its own judicial power in this case.[70]

The brief also matched its opponents' deep dive into history by pointing to Blackstone's writings about the power of the House of Commons to judge qualifications of membership, arguing "It was with that knowledge of this long-standing tradition that the Framers wrote into the Constitution that each House shall have the power to judge the qualifications of its members and to expel them." The brief also reiterated the four *Baker* factors the House identified in

the Memorandum in Opposition to Granting Certiorari as reasons why this case presented a nonjusticiable political question.[71] Finally, it restated the respondents' mootness claim, noting that any judgment now would be "entirely academic" since Powell was a member of the 91st Congress.[72]

Though the petitioners' brief extensively addressed the alleged racial animus that motivated Powell's exclusion, the respondents' brief devoted only two pages to the issue. Rather than dismiss the claims of racism outright, the brief argued the Court could not probe into the "mental processes" by which legislators decide matters. It rejected the Thirteenth Amendment argument because the exclusion of Powell "ha[d] nothing to do with slavery," the Fourteenth Amendment argument because Powell failed to allege intent to discriminate against African Americans as a class, and the Fifteenth Amendment argument because H. Res. 278 did not explicitly deny petitioners the right to vote because of their race. To the extent that Powell's constituents were denied representation, that denial was, according to respondents, "perpetuated by Mr. Powell himself."[73] This flippant reply was reminiscent of respondents' Memorandum in Opposition to Granting Certiorari, which alleged Powell only brought this case to bolster his political image. Once again, the respondents missed an opportunity to engage in a thorough discussion of why race was not an issue in this case, or, at a minimum, why it was not adequate grounds to hear this case. Their brief instead suggested Powell himself was to blame for his exclusion—an image that could hardly square with Warren's view of a congressman targeted for his civil rights advocacy.[74]

The Oral Argument Blunder Heard Around D.C

In the constitutional showdown of the judiciary against the legislative branch, it is unsurprising that the drama outside of the courtroom infiltrated the nation's most hallowed chambers. On January 29, 1969, just one month before the scheduled argument, attorneys working with the respondents' oral advocate, Bruce Bromley, requested an extension on brief filing and argument for a medical emergency: Bromley's retina detached.[75] The next day, one of Powell's attorney's sent a forceful letter to Court arguing that further delay would cause irreparable harm to Powell because of the $25,000 fine that was being deducted from his monthly salary.[76]

Warren sent a memorandum to the justices on January 31, 1969, about the proposed delay. He solicited their views but noted his "serious doubts" about delaying the case since there was no guarantee Bromley would recover by the argument date suggested by respondents. The justices chimed in immediately, but failed to reach a consensus. Douglas voted not to postpone oral argument, potentially fearing the case would become moot due to a delay, as Westen's memo suggested. Marshall voted to delay and added cheekily "I still remember that petitioner filed on the last day." On February 4, 1969, Warren proposed setting the argument in April with the understanding that it must be argued at that time, even if Bromley had not recovered. In a second memorandum sent the same day, Warren alerted the Conference that six of the justices agreed to his compromise and the argument was scheduled for the April session.[77]

As scheduled, the Court heard the argument for *Powell v. McCormack* on April 21, 1969. Arthur Kinoy and Herbert O. Reid argued for the petitioners, while a recovered Bruce Bromley argued for the respondents.[78] The opposing counsel were well matched: Kinoy was a renowned trial lawyer who, along with his firm partner William Kunstler, represented some of the most high-profile civil rights cases of the 1960s, including the *Chicago Seven*.[79] Reid was a prominent civil rights lawyer and faculty member at Howard

Arthur Kinoy (above) and Herbert O. Reid represented Powell in the Supreme Court. Kinoy wove judicial supremacy into his arguments and frequently cited *Marbury v. Madison* (1803) as precedent.

University School of Law; he also worked on landmark civil rights cases including *Bolling v. Sharpe* and the civil suit for the 1969 assassination of Fred Hampton.[80] Bromley, specially retained by Speaker of the House John McCormack at the recommendation of Celler, was a former judge on the New York Court of Appeals.[81]

Kinoy and Reid wove judicial supremacy throughout their argument. Kinoy began by stating the "key to this case" was *Baker*'s proposition that "it is the responsibility of this Court [to provide a remedy] as the ultimate interpreter of the Constitution." Both Kinoy and Reid frequently cited to *Marbury v. Madison* and *Cooper v. Aaron* for the proposition that "the federal judiciary is supreme in the exposition of the law of the Constitution." Kinoy further argued that judicial intervention was required in Powell's case to preserve the rights of Powell's constituents, going so far as to argue "The reaffirmation that this is a government of laws . . . is particularly necessary when the crisis arises in a context in which Black citizens are denied the right to elect their own Black representative."[82]

Picking up the torch, Reid urged the House to recognize the "historical role of the Court in the area of judicial review . . . that in separation of powers what had been separated and given to the judiciary was a matter of deciding cases." Reid also briefly argued the case was not moot, but only received one question on the matter, from Justice White, who asked "Do I understand you then that your position now is that all you seek is declaratory judgment?" After a brief back and forth about the merits of declaratory judgment, White asked "Well that sounds to me that you'd be content with just the declaratory judgment that Resolution 278 was unconstitutional," to which Reid replied "Yes."[83]

Bromley countered Kinoy and Reid's judicial supremacy argument with departmentalism, stating, "Since the legislative is co-equal with the judicial branch, the judgments which the House makes in this situation in the field allocated to it, i.e. the qualification of its members are exclusive and supreme." He further argued the legislative branch should control its internal affairs, but Warren was unconvinced and immediately asked "They can fix any qualifications they want?" Warren questioned whether any precedent supported this position, and Bromley was forced to concede, "Well, I don't think your cases have ever had occasion to consider it."[84]

While the battle over departmentalism framed the argument, questions about race defined it. Black asked "Suppose he had been excluded because of his race. . . . Would you say that he would have any judicial remedy?" Without pausing to consider the question, Bromley confidently answered that while the action would be unconstitutional, the Court could not intervene because Article I, Section 6, Clause 1, the Speech or Debate Clause, immunized Congressmen from lawsuits. After a prolonged silence from the bench, Bromley, with audible trepidation, reaffirmed, "So, our position is that what the House did in this matter was for the House and the House alone to decide, and its actions should and [are] not subject to judicial review." Of course, the Speech or Debate Clause would not

immunize a congressman from taking the action of excluding a fellow congressman on the basis of intentional racial discrimination, but in Bromley's rush to answer the question, he cemented respondents to this erroneous position.[85]

Bromley's blunder hung in the air, and ten minutes later Warren and Fortas followed up with their own hypotheticals on race-based exclusion. Fortas asked whether exclusion from Congress on the basis of race would constitute such "utter perversion" to justify judicial intervention. Rather than correct his earlier error, Bromley again affirmed racial exclusion would not be so utterly perverse that the Court could intervene. Before Bromley could even begin his next sentence, Warren jumped in and asked, "Judge Bromley, what could be more perverse than that?" The chambers erupted in laughter. A clearly flustered Bromley responded, "Well, a great many things." Unwilling to move from the topic, Warren pressed for examples. It was then that Bromley delivered a line fatal to his argument and his credibility: "Seizing the President and dragging him in to the well of the House under a resolution that he be beheaded." Though his answer actually came from *Kilbourn v. Thompson*,[86] the absurdity of using it as a response to the justices' serious concerns about race was not lost on Warren or the chambers, who again erupted in laughter. Bromley finally seemed to realize his error, and he attempted to regain the justices' favor by admitting, "if all Blacks were excluded . . . that would be an utter perversion possibly."[87] It was too late. The media were quick to note that Bromley said exclusion because of race was not an utter perversion and widely reported the beheading line.[88]

For Warren, race was at the heart of this case.[89] But Bromley's error committed the respondents to the position that even in cases of blatant racial discrimination, the Court could not act. This only compounded the issue created by the respondents' lack of consideration for racial discrimination in its memorandum and brief. Neither Bromley's argument nor the respondents' brief could answer for the strong allegations of racism tainting Powell's case. But Arthur Kinoy and Herbert O. Reid could. The answer, as proposed in their oral argument, was judicial supremacy. The Court could assume the role created by *Marbury* and *Cooper* and *Baker* to, as Kinoy argued, act as "the ultimate interpreter of the Constitution."[90]

The Justices Weigh in at Conference

Douglas's conference notes only take up one page, but they show that all justices, except for Stewart, voted to reverse the D.C. Circuit's opinion. Warren voted to reverse and offer declaratory relief. The conference notes reveal he discussed England, likely a reference to the House of Commons expulsion of John Wilkes for publishing an attack on a French peace treaty. The petitioners' brief discussed Wilkes' fight to be reseated in the House of Commons at length and noted the Framers used his expulsion as a cautionary tale that "If [the House] can reject those disagreeable to a majority, and expel whom [it] please[s], the House of Commons will be self-created and self-existing."[91] Indeed, Warren's final opinion relies on the Wilkes case heavily, suggesting this is the "England" topic he discussed at conference. The conference notes also reveal that Warren discussed the Federalist Papers and his view that Congress cannot create a different qualification for House membership outside of the Constitution.[92]

Associate Justices Black, White, and Fortas also voted to reverse the D.C. Circuit, and their recorded reasoning was "agree with CJ." Douglas recorded himself as agreeing with Black, as denoted by quotation marks implying he agreed with what was written immediately above. Harlan also voted to reverse, but noted that the Court of Claims could "determine [Powell's] salary for office." He also believed that Congress should

be confined to what is "set by [the] Constitution," and it was "not necessary" to serve Powell "with a fine." Brennan and Marshall voted to reverse with no recorded comments. Finally, Stewart's vote is not recorded, but the statement by his name reads "case is moot," suggesting he would affirm the D.C. Circuit, which he ultimately argued in his dissent.[93]

Marbury Returns: Justice Black's Influence on the Draft Opinion

According to Warren's notes, he circulated his first draft of the majority opinion on June 9, 1969.[94] Warren's clerks recall working tirelessly on the opinion, which the Chief believed would be a "great historical document." Warren regularly conferenced with Brennan on the opinion, seeking the stamp of approval from his "intellectual consigliore" who frequently provided the more academic basis for the Chief's lofty goals of justice. Indeed, one of Warrens' clerks recalled that Warren "didn't want anybody to know who in the office was working on" the draft until it was finished. When it was, Warren rushed the draft to Brennan who read it and said, "Great work. Great job." Only then did Warren circulate the draft for the rest of the justices.[95]

Douglas signed on to the opinion on the same day Warren circulated his draft.[96] However, he sent a note four days later, on June 13, 1969, telling Warren that he would be filing a concurring opinion.[97] On June 9, Stewart had asked Warren to correct language about Powell's fine—the draft opinion stated Powell's seating was conditional upon paying the $25,000 fine, but in fact Powell was first seated and then charged with the fine. Stewart wrote, "Since I plan to write a dissenting opinion in this case, I am somewhat hesitant about proffering a suggestion with respect to your opinion for the Court."[98] Marshall joined Warren's majority opinion on June 10, writing only "Please join me."[99] White also signed on, and he wrote, "I am glad to join your excellent opinion in this case."[100] Harlan joined the opinion two days later.[101]

Handwritten notes on the June 9 master copy of the draft opinion show Warren incorporated the majority of the justices' feedback. Warren's notes also show the first of two notable changes to the political question doctrine section on the June 9 draft. Warren edited out the phrase "declaratory judgment" in the political question analysis and replaced it with "a determination of petitioner Powell's right to sit" and "a determination that the House was without power to exclude Powell from the 90th Congress." Thus, the draft line, "But, as our interpretation of Art 1, s 5 discloses, a declaratory judgment would require no more than a declaration of rights based solely on an interpretation of the Constitution," became "But, as our interpretation of Art 1, s 5 discloses, a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution." Likewise, the sentence "Petitioners seek a declaratory judgment, which we have seen, requires an interpretation of the Constitution" became "Petitioners seek a determination that the House was without power to exclude Powell from the 90th Congress, which we have seen, requires an interpretation of the Constitution."

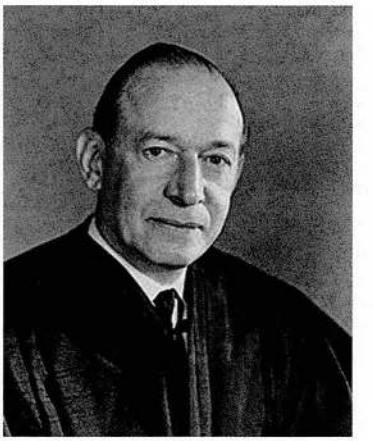
This change was significant in two ways. First, it aggrandized the Court's power against Congress by replacing the generic "declaratory judgment" language with language about the direct confrontation between the Court's holding and the congressional act of Powell's exclusion. Second, it removed the actual remedy Powell sought—declaratory judgment—from the section, further unmooring the Court's political question doctrine analysis from the actual legal issues presented in this case.[102]

On June 13, 1969, Black offered a final suggestion that would cement Warren's opinion as a judicially supremacist expansion of the Court's authority even in

separation-of-powers political question decisions. Black recommended citing to *Marbury* along with *Baker* in the political question doctrine analysis because "*Marbury v. Madison* goes back much farther than our present Court."[103] In a draft opinion dated for the same day, Warren incorporated this change. The original line read, "For, as we noted in *Baker v. Carr, supra*, at 211, it is the responsibility of this Court to act as the ultimate interpreter of the constitution."[104] At Black's recommendation, he added a citation to *Marbury* right after this sentence.[105] Black's suggestion could have been a product of many things: the strategic and frequent citations to *Marbury* in Powell's brief, Kinoy's many references to *Marbury* at oral argument, or simply Black's desire to ground the analysis in something other *Baker*, a Warren Court opinion that "promoted alarums and excursions . . . in the legal-political world."[106] Whatever the motive, the end result was clear. This citation established that the Court's power to eschew departmentalism and intervene in separation of powers political questions predated the Warren Court and *Baker*.

"An Improper and Dangerous Power in the Legislature": Warren's Final Opinion Mitigates Political Question Concerns in Separation of Powers Cases

Warren's majority opinion represented a sweeping repudiation of Congress's claim that it retained authority to discipline its own members. In a nearly-unanimous opinion, the Chief Justice cabined the qualifications for House membership to the three qualifications explicitly stated in Article I, Section 2: age, citizenship, and inhabitancy. The Court ruled for Powell seven to one, with Douglas writing a concurring opinion and Stewart dissenting.[107] Justice Fortas was no longer on the Court when the opinion was decided, although he participated in oral argument and the cert vote. Based on his willingness to hear the case and his questions at oral argument, it is likely he would have joined the majority opinion. Indeed, a vote sheet from Justice Douglas's conference notes shows "AF" voted to "reverse" with "CJ," the Chief Justice.[108]



Justice Abe Fortas resigned 33 days before the decision was announced, but had participated in oral argument and the cert vote. He likely would have joined the majority opinion according to Justice Douglas' conference notes which show "AF" voting to "reverse" with the "CJ."

In holding the case a justiciable question with no political question doctrine concerns, Warren primarily relied on only one constitutional modality—legislative history. While the Chief Justice cited to *Baker* to establish the framework of justiciability and the political question doctrine, his consideration of precedent stopped there. In place of a precedent, text, or purpose-based legal analysis, Warren methodically catalogued instances of the Framers condemning legislative expulsions in a timeline that spanned through pre-Convention, the Convention debates, and post-ratification.[109]

From the pre-Convention era he cited to the John Wilkes case discussed in petitioners' brief and at conference. Warren noted that Wilkes' fight to be re-seated in the House of Commons was a "*cause celebre*" for the American colonists, and the Framers saw Wilkes as a "popular hero and a martyr to the struggle for liberty." Jumping to the

Convention debates, Warren highlighted the views of Madison and Hamilton, noting that Madison rejected a proposal that would have permitted the legislature to establish uniform qualifications for House membership with regard to property. Madison deemed this an "improper and dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican [government] and ought to be fixed by the Constitution." Warren added that Hamilton similarly valued the principle that popular election should be "perfectly pure, and the most unbounded liberty allowed," which Hamilton discussed at the New York Convention. Finally, Warren concluded that for the first 100 years of its existence, Congress limited its discretion over House membership to the qualifications enumerated in the Constitution.[110]

Warren included this historical analysis under the heading "Political Question Doctrine: Textually Demonstrable Constitutional Commitment." However, the discussion of the political question factors highlighted in *Baker*, including whether a decision would demonstrate a lack of respect to a coordinate branch of government, was actually buried in the subheading "Conclusion." There, the Chief Justice minimized any concerns of a nonjusticiable political question and wrote: "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." Reaffirming this point, Warren held that Powell's request involved an interpretation of the Constitution and whether its qualifications for House membership were exclusive. This kind of question was not only answerable under judicially manageable standards, but would not result in *Baker's* concern of "multifarious pronouncements by various departments on one question" because it is "the responsibility of this Court to act as the ultimate interpreter of the Constitution."[111]

Although Warren discussed the racial overtones of the case with his clerks,[112] and asked questions about race-based exclusion at oral argument, he did not address the Thirteenth, Fourteenth, or Fifteenth Amendment arguments in his opinion. Only Douglas's short concurring opinion addressed the issue. In his concurrence, Douglas rejected the idea that the House could exclude a Member for any qualification not established in Article I, Section 5, particularly when that exclusion "will have the racist overtones of the present one." Although his concurring opinion was not based on equal protection grounds, Douglas affirmed *Reynold's* signature holding and wrote "Today, we proclaim the constitutional principle of 'one man, one vote.'" Douglas's direct acknowledgment of the racism motivating Powell's exclusion further supports the idea that this case was, at its heart, about race. And references to a line from *Reynolds* that had "shaky foundations in the text of the Constitution"[113] further demonstrated that the Court was willing to forgo sound legal principles of separation of powers and nonjusticiability in favor of remedying Powell's discriminatory exclusion.[114]

As the lone dissenter, Stewart exercised judicial restraint and argued, "courts should not intervene unless the need to equitable relief is clear, not remote or speculative." Stewart believed the case was moot because "the passage of time and intervening events have . . . made it impossible to afford the petitioners the principal relief they sought in this case." While not directly addressing the political question doctrine argument, Stewart did note that the fact that the issues in this case were so political should have counseled further hesitation.[115]

Conclusion

As one of Warren's clerks reminisced, "We thought Powell versus McCormack

would be a major case, but really, Congress had never sought to replicate that silliness."[116] Indeed, the opinion did not become canonical in the Warren Court era, nor did it receive a prominent place in history books. So why would the Chief Justice use an essentially moot, separation-of-powers case to so strongly cabin the political question doctrine? Like so many Warren Court cases that involved race but were not decided on that ground, the Chief Justice's primary motivation appeared to be the racial animus targeted at Powell.[117]

To his clerks Warren was "not a man who talked a lot about constitutional theory or about issues in constitutional law. He was kind of focused on what's the fair and right thing to do in this particular case."[118] Here, Warren saw the House exclude a duly-elected Representative who was one of the most powerful and senior Black members of Congress. And when that Representative was overwhelmingly reelected by his constituents, Congress levied further sanctions against him. In its brief, the respondents flippantly dismissed the alleged discrimination as a product of Powell's own making. Bromley only added insult to injury when he told Warren that the Court could not intervene even in cases where a congressman was expelled exclusively because of his race. Time and again, the Court gave respondents the opportunity to account or atone for the discriminatory implications of Powell's exclusion, but the respondents provided no explanation.

For Warren, this would not do. His opinion in *Powell* has been called his "last lesson in civics," a sweeping statement that the Court could review nearly any decision of Congress or the Executive branch.[119] While Warren issued the statement, it was Black who provided the legal means: The Court could aggrandize its own authority through *Marbury* to intervene even in separation of powers political questions by cabining Congress's authority to those qualifications explicitly stated in the Constitution. This allowed the Court to hold that the "House was without power to exclude [Powell] from its membership."[120]

Of course, there were ramifications for Warren adopting this view and prioritizing the "fair and right thing" for Powell over a more thorough legal analysis. The Court further constricted the political question doctrine, which had already been narrowed by *Baker*. It also created a broad rule limiting congressional authority to seat or not seat members; this rule applies not only to sympathetic plaintiffs, such as Powell but to all elected representatives. Finally, the Court engaged in a direct confrontation with a coordinate branch. To the extent that *Powell v. McCormack* lives on in the annals of history, it is with this legacy, not the lofty aspirations that Warren pinned on the opinion in 1969.

Author's Note: I would like to thank Professor Brad Snyder for his continued support and thoughtful feedback during the drafting and editing of this piece.

Olivia O'Hea wrote this article as a third-year J.D. Candidate at Georgetown University Law Center.

ENDNOTES

[1] 395 U.S. 486 (1969).

[2] *See* Robert T. Lasky "The Law Clerks of Chief Justice Earl Warren: Robert T. Lasky" conducted by Laura McCreery in 2005, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2014 [hereinafter Lasky Interview].

[3] *See ibid.*

[4] 113 Cong. Rec. 4862, 5039 (March 1, 1967).

[5] Oswald Johnson, *High Court Takes Case of Powell: Sets Stage for Clash with Congress Over Limits*, BALTIMORE SUN, November 19, 1968, A1 ("By so doing the court, already bruised by Congress once this year in the Senate struggle over Justice Abe Fortas, has boldly stepped forward for another clash with the legislative branch.").

[6] H.R. Rep. No. 90-27, 31 (1967) [hereinafter Committee Report].

[7] Scott Bice "The Law Clerks of Chief Justice Earl Warren: Scott Bice" conducted by Laura McCreery in 2004, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2014 [hereinafter Bice Interview].

[8] Lasky Interview. Of course, it remains an open question whether Powell, the outspoken minister-turned politician, could truly be characterized as a passive victim of Congressional animus. Indeed, upon Powell's triumphant return to the House floor following his 1968 reelection, he missed the first roll call. Never one to forgo a theatrical moment, he decided to make a grand entrance—sauntering up the aisle and stopping dramatically to kiss new Congresswoman Shirley Chisholm on the hand. Richard L. Madden, *Re-enter Powell, Battered but Unbowed*, N.Y. TIMES, January 5, 1969, E3.

[9] *See* Vince Blasi, *A Requiem for the Warren Court*, 48 TEX. L. REV. 608, 616 (1970) (noting *Powell v. McCormack* limited the political question doctrine, and, as a result, "expand[ed] significantly the role of the Court and to reduce the fairly broad range of governmental activities for which the Constitution is a merely hortatory limitation"); Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L. J. 227, 236 (1972) (referring to *Powell v. McCormack* as a "Quixotic gamble of the Court's institutional capital in political Russian roulette"); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1208 (2002) ("*Powell* and the reapportionment cases following *Baker v. Carr* show how easy it is to interpret the clauses at issue in order not to commit the question to the political branches."); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 269 (2002) (noting that in *Powell*, "Prudential factors had no bearing on the Court's decision, leaving some to question whether that strand of the doctrine had died completely").

[10] Lasky Interview.

[11] Biography, Powell, Adam Clayton Jr., United States House of Representatives History, Art & Archives, https://history.house.gov/People/Listing/P/POWELL,-Adam-Clayton,-Jr-(P000477).

[12] Irwin Ross, *Adam Clayton Powell Jr. Part Three of Five*, BALTIMORE AFRO-AMERICAN, May 5, 1956, 20F; *Powell Bill Would Ban Jim Crow Cars*, ATLANTA DAILY WORLD, February 10, 1945, 5.

[13] William F. Buckley Jr., *Adam Clayton Powell: Getting His Deserts?*, L.A. TIMES, January 9, 1967, at A5; *Mrs. Truman 'Last Lady' in Rep. Powell's Book*, BALTIMORE SUN, October 13, 1945, 5; POWELL, ADAM CLAYTON JR., United States House of Representative History, Art & Archives, https://history.house.gov/People/Listing/P/POWELL,-Adam-Clayton,-Jr-(P000477)/; Irwin Ross, *Adam Clayton Powell Jr. Part Five of Five*, BALTIMORE AFRO-AMERICAN, May 19, 1956, 20F.

[14] *See, e.g.*, Estimated Federal Payments under "The Elementary and Secondary Education Act of 1965," ca. 1965; "Education: Elementary and Secondary Education Act of 1965" folder, Box 4; Senate Committee on Education and Public Welfare; 89th Congress; Records of the U.S. Senate, RG 46; National Archives (describing the expenditures of the original House bill); Lyndon B. Johnson Message to Congress on Education, January 12, 1965; "Education" folder, Box 1; Senate Committee on Education and Labor; 89th Congress, Records of the U.S. Senate, RG 46; National Archives.

[15] *Powell in Line for Top Post*, CHICAGO DEFENDER, November 19, 1960, 1.

[16] POWELL, ADAM CLAYTON JR., United States House of Representative History, Art & Archives, https://history.house.gov/People/Listing/P/POWELL,-Adam-Clayton,-Jr-(P000477)/.

[17] Arnold Sawislak, *The 'Pruning' of Adam Clayton Powell*, CHICAGO DEFENDER, October 8, 1966, 8 (writing about how Powell's aide heard from the Capitol Hill gossip circuit that one member of Powell's Committee was seeking to strip him of his chairmanship).

[18] Committee Report, 1.

[19] *Powell v. McCormack*, 395 F.2d 577, 579 (1968).

[20] Committee Report, 2.

[21] Letter from aide to Emanuel Celler, December 2, 1966, Emanuel Celler Papers, Library of Congress, Box 509.

[22] Committee Report, 2, 6, 13; H. Res. 1, 90th Cong. (1967).

[23] Richard L. Lyons, *Former Rep. Emanuel Celler Dies; Civil Rights Champion*, WASH. POST., January 16, 1981, B5; Maurice Carroll, *Emanuel Celler, Former Brooklyn Congressman, Dies at 92*, N.Y. TIMES, January 16, 1981, D16.

[24] "Response of Member-Elect Adam C. Powell, By Counsel, to Letter of February 10, 1967 From Chairman Emanuel Celler," February 10, 1967, ACLU Papers, Mudd Library, Princeton University, Box 1630, Item 831 (listing all of the attorneys representing Adam Clayton Powell).

[25] Committee Report, 5–6.

[26] *Ibid.* 1, 31, 33.

[27] Committee Report, 35.

[28] Joseph A. Loftus, *Seat for Powell, Censure and Fine, Reported in View*, N.Y. TIMES, February 23, 1967, 1.

[29] Daniel Rapoport, *Seat-And-Punish Formula: Powell's Reaction Big Question*, THE DENVER POST, February 24, 1967, 6.

[30] 113 Cong. Rec. 4862, 4997–5039 (March 1, 1967) (debate over H. Res. 278) [hereinafter Congressional Record].

[31] *Ibid.* 4999, 5005, 5007, 5015, 5029.

[32] *Id.* Although Representative Curtis offered the final amendment in the contentious House debate, earlier correspondence suggests he wanted to avoid a public

image of partisanship in the investigation of Representative Powell. In a letter to the ACLU, Representative Curtis requested an alteration to a document from the ACLU that, according to Curtis, contained an inaccurate account of the Congressional procedure leading up to the vote to form the Select Committee to investigate Powell. In this letter, he said the accounts of procedure displayed in the news media and the ACLU document were "inaccurate and partisan presentations of what actually occurred." Thomas B. Curtis to Lawrence Speiser, February 2, 1967, ACLU Papers, Mudd Library, Princeton University, Box 1630, Item 831.

[33] Congressional Record, 5037. It is worth briefly noting that Powell was excluded from Congress, but he was not expelled. As Powell was never formally seated, he could not be expelled. Thus, the ensuing Supreme Court case, *Powell v. McCormack*, did not decide the precise constitutional limits of the expulsion power in Article I, Section 5, Clause 2. Ronald D. Rotunda & John E. Nowak, 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 9.2(c) (2021 ed., 1986).

[34] *Powell Says He'll Fight to Regain Seat: Confident of a Quick Court Victory*, CHICAGO TRIBUNE, March 4, 1967, 9.

[35] Committee Report, 31. Celler was not the only congressman who condemned the impending litigation. Representative Curtis, who offered the amendment to exclude Powell, wrote a brief article where he condemned the judiciary for interfering in the case. In it, he concluded "I feel so strongly about the power of the House of Representatives to govern its internal affairs without external interference that I resent the courts even discussing the Adam Clayton Powell case." Thomas B. Curtis, *The Power of the House of Representatives to Judge the Qualifications of Its Members*, 45 TEX. L. REV. 1199, 1203 (1967).

[36] Joseph A. Loftus, *House Picks a Lawyer Here to Fight Powell Suit; Ex-Judge Bromley Is Chosen by Speaker McCormack*, N.Y. TIMES, March 15, 1967, 40.

[37] Brief for Petitioner at 128, *Powell v. McCormack*, 395 U.S. 486 (1969) (No. 138) [hereinafter Petitioners' Brief] (citing an excerpt from WNBC-TV's "Searchlight" on Sunday, May 14, 1967).

[38] *Powell v. McCormack*, 266 F.Supp. 354, 354 (D.D.C. 1967).

[39] *Ibid.* 359, 360.

[40] *Powell v. McCormack*, 395 F.2d 577, 603 (D.C. Cir. 1968).

[41] 369 U.S. 186 (1962).

[42] 385 U.S. 116 (1966).

[43] *Ibid.* 589.

[44] *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

[45] *Ibid.* at 605, 607.

[46] Petition for Writ of Certiorari, *Powell v. McCormack*, *Powell v. McCormack*, 395 U.S. 486 (1969) (No. 138).

[47] Memorandum for Respondents in Opposition, *Powell v. McCormack, Powell v. McCormack*, 395 U.S. 486 (1969) (No. 138) [hereinafter Memorandum in Opposition] (arguing, in part, Powell's cert petition "leads reasonably to speculation whether petitioners have some purpose in mind other than seeking review in this Court").

[48] Bice interview.

[49] Peter K. Westen to William O. Douglas, "Powell v. McCormack: Cert. to D.C. Cir. Opposition," July 13, 1968, William O. Douglas Papers, Library of Congress, Box 1446.

[50] *Powell Wins Race, But by Slim Margin of 3–2 Over Rival*, N.Y. TIMES, June 19, 1968, 32; Earl Caldwell, *But Hall, Challenger of Powell in 18th, Voices Hope*, N.Y. TIMES, October 30, 1968, 29.

[51] Peter K. Westen to William O. Douglas, "Powell v. McCormack: Cert. to D.C. Cir. Opposition," July 13, 1968, William O. Douglas Papers, Library of Congress, Box 1446.

[52] Peter K. Westen to William O. Douglas, "Powell v. McCormack: Cert. to D.C. Cir. Opposition," July 13, 1968, William O. Douglas Papers, Library of Congress, Box 1446.

[53] Abe Fortas had not yet resigned from the Court. *Supreme Court Will Review Powell Case*, CHICAGO DEFENDER, November 19, 1968, 7; *see also* Oswald, *High Court Takes Case of Powell* ("By so doing the court, already bruised by Congress once this year in the Senate struggle over Justice Abe Fortas, has boldly stepped forward for another clash with the legislative branch.").

[54] *The Court's Authority*, BALTIMORE SUN, November 24, 1968, K4.

[55] Ethel L. Payne, *So This Is D.C.*, CHICAGO DEFENDER, November 30, 1968, 6 ("Now that the Supreme Court has decided to hear the suit of Adam Clayton Powell against his exclusion by the House of Representatives two years ago, the hackles have been raised on the back of many members who are fiercely opposed to interference in this case.").

[56] Ethel L. Payne, *So This Is D.C.*, CHICAGO DEFENDER, November 30, 1968; Richard L. Madden, *Powell Seated, Fined $25,000 and Denied Seniority*, N.Y. TIMES, January 4, 1969, 1.

[57] Richard L. Madden, *Powell Seated, Fined $25,000 and Denied Seniority*, N.Y. TIMES, January 4, 1969, 1.

[58] 115 Cong. Rec. 12, 22 (January 3, 1969).

[59] 377 U.S. 533 (1964).

[60] Petitioners' Brief, 56 (statement from Robert R. Livingston from Elliot's Debates, Book I, Vol. II (Lippincott Co., 1836)).

[61] 377 U.S. 533 (1964).

[62] 369 U.S. 186 (1962).

[63] 5 U.S. (1 Cranch) 137 (1803).

[64] Petitioners' Brief, 27, 57, 145, 156, 144, 163.

[65] *Ibid.* 119. Interestingly, this was not the first time *Dred Scott* loomed over a congressional attempt to exclude a prominent Black political figure. In 1870, Senate Democrats objected to the seating of Hiram Revels, a Black man chosen to serve as a United States Senator for Mississippi. The Democrats argued Revels could not meet the citizenship requirements in Article I, Section 3, because, per *Dred Scott*, Revels had not been a citizen for the requisite nine years. For further discussion of the attempt to exclude Revels, see Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680 (2006).

[66] *Ibid.* at 130

[67] Respondents' Memorandum suggesting that this action should be dismissed as moot, *Powell v. McCormack*, 395 U.S. 486 (1969) (No. 138).

[68] Peter K. Westen to William O. Douglas, "Memo Suggesting Mootness," January 22, 1969, William O. Douglas Papers, Library of Congress, Box 1446.

[69] Lasky interview.

[70] Brief for Respondent, *Powell v. McCormack*, 395 U.S. 486 (1969) (No. 138).

[71] Memorandum in Opposition.

[72] Respondent's Brief, 111.

[73] *Ibid.* at 105–107, 109, 111.

[74] Bice interview.

[75] John R. Hupper, Counsel, Cravath, Swaine & Moore to John F. Davis, Clerk, Supreme Court of the United States, "*Powell, et al. v. McCormack, et al.*," January 29, 2969, William O. Douglas Papers, Library of Congress, Box 1446.

[76] Herbert O. Reid, Counsel, Howard University to John F. Davis, Clerk, Supreme Court of the United States, "*Powell, et al. v. McCormack, et al.*," January 29, 2969, William O. Douglas Papers, Library of Congress, Box 1446.

[77] Earl Warren to Conference, "Re: No. 138—*Powell v. McCormack*," February 1, 1969, Byron White Papers, Library of Congress, Box 142, Folder 6; Thurgood Marshall to Earl Warren, "Re: No. 138—*Powell v. McCormack*," February 3, 1969, William J. Brennan Papers, Library of Congress, Box I-190; Earl Warren to Conference, "Re: No. 138—*Powell v. McCormack*," February 4, 1969, Byron White Papers, Library of Congress, Box 142, Folder 6.

[78] Oral Argument, *Powell v. McCormack*, 395 U.S. 486 (1969), No. 69–138, https://www.oyez.org/cases/1968/138 [hereinafter Oral Argument].

[79] *Racially Mixed Law Firm Gets a New Partner*, CHICAGO DEFENDER, July 20, 1967, 4; F. Richard Ciccone, *5 of Chicago 7 Appeal Riot Convictions*, WASH. POST, February 9, 1972, A9.

[80] Brief for Petitioners on Reargument, *Bolling v. Sharpe*, 347 U.S. 497 (1954); Robert McClory, *Exdean enters Panther case*, CHICAGO DEFENDER, April 21, 1975, 5.

[81] *N.Y. Attorney Hired to Fight Powell Suit*, UPI, March 15, 1967 (reprinted in the *Los Angeles Times*, March 15, 1967, at 5); Joseph A. Loftus, *House Picks a Lawyer Here to Fight Powell Suit; Ex-Judge Bromley Is Chosen by Speaker McCormack*, N.Y. TIMES, March 15, 1967, 40.

[82] Oral Argument.

[83] *Ibid.*

[84] *Id.*

[85] *Id.*

[86] 103 U.S. 168 (1880).

[87] *Ibid.*

[88] *Adam, Lawyers Battle Ouster Before U.S. Supreme Court*, CHICAGO DEFENDER, April 22, 1969, at 2; Richard L. Maddens, *House's Exclusion of Powell Is Argued in the Supreme Court*, N.Y. TIMES, April 22, 1969, 26.

[89] Bice interview.

[90] Oral Argument.

[91] Petitioners' Brief, 35–46.

[92] Conference Notes, "No. 138—*Powell v. McCormack*," April 25, 1969, William O. Douglas Papers, Library of Congress, Box 1446.

[93] *Ibid.*

[94] Chamber Notes, "*Powell v. McCormack Circulations*," Earl Warren Papers, Library of Congress, Box 629, Folder 2.

[95] *See* Lasky interview; Bice interview. After the first circulation, Brennan suggested one substantive change on an inconsistency in Warren's discussion of the Speech or Debate Clause. William Brennan to Earl Warren, "Re: No. 138—*Powell v. McCormack*," June 10, 1969, Earl Warren Papers, Library of Congress, Box 629, Folder 2. Brennan suggested an edit to make the opinion consistent, and Warren replied shortly thereafter that he would be "happy to make the changes." Bice interview.

[96] Byron White to Earl Warren, "Re: No. 138—*Powell v. McCormack*," June 11, 1969, Earl Warren Papers, Library of Congress, Box 629, Folder 2, Reel 18.

[97] William Douglas to Earl Warren, "Re: No. 138—*Powell v. McCormack*," June 11, 1969, William O. Douglas Papers, Library of Congress, Box 1446.

[98] Potter Stewart to Earl Warren, "Re: No. 138—*Powell v. McCormack*," June 11, 1969, Earl Warren Papers, Library of Congress, Box 629, Folder 2, Reel 18.

[99] Thurgood Marshall to Earl Warren, "Re: No. 138—*Powell v. McCormack*," June 10, 1969, Earl Warren Papers, Library of Congress, Box 629, Folder 2, Reel 18.

[100] Byron White to Earl Warren, "Re: No. 138—*Powell v. McCormack*," June 10, 1969, Earl Warren Papers, Library of Congress, Box 629, Folder 2, Reel 18.

[101] John Marshall Harlan to Earl Warren, "Re: No. 138—*Powell v. McCormack*," June 12, 1969, Earl

Warren Papers, Library of Congress, Box 629, Folder 2, Reel 18.

[102] Draft Opinion, "No. 138—*Powell v. McCormack*," June 9, 1969, Earl Warren Papers, Library of Congress, Box 628, Reel 17. Warren corrected the language about the fine at Stewart's request and he made changes proposed by Brennan on the Speech or Debate clause section.

[103] Hugo Black to Earl Warren, "Re: No. 138—*Powell v. McCormack*," June 13, 1969, Earl Warren Papers, Library of Congress, Box 629, Folder 2, Reel 18.

[104] Draft Opinion, "No. 138—*Powell v. McCormack*," June 13, 1969, Earl Warren Papers, Library of Congress, Box 628, Reel 18.

[105] Hugo Black to Earl Warren, "Re: No. 138—*Powell v. McCormack*," June 13, 1969, Earl Warren Papers, Library of Congress, Box 629, Folder 2, Reel 18.

[106] Geoffrey R. Stone & David A. Strauss, *Democracy and Equality: The Enduring Constitutional Vision of the Warren Court* 80 (2019) (discussing the difference between the scholarly response to *Baker* and the public's response to *Baker*).

[107] *Powell v. McCormack*, 395 U.S. 486, 490 (1969).

[108] Conference Notes, "No. 138—*Powell v. McCormack*," April 25, 1969, William O. Douglas Papers, Library of Congress, Box 1446.

[109] *Ibid.* at 517–522, 523–547.

[110] *Id.* at 530–531, 540, 542.

[111] *Id.* at 549 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

[112] Bice interview.

[113] Stone & Strauss, 76.

[114] *Powell*, 395 U.S. at 553.

[115] *Ibid.* at 566, 573.

[116] Lasky interview.

[117] *See generally NAACP v. Alabama*, 357 U.S. 449 (1958); *Baker v. Carr*, 369 U.S. 186 (1962); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Pierson v. Ray*, 386 U.S. 547 (1967).

[118] *Ibid.*

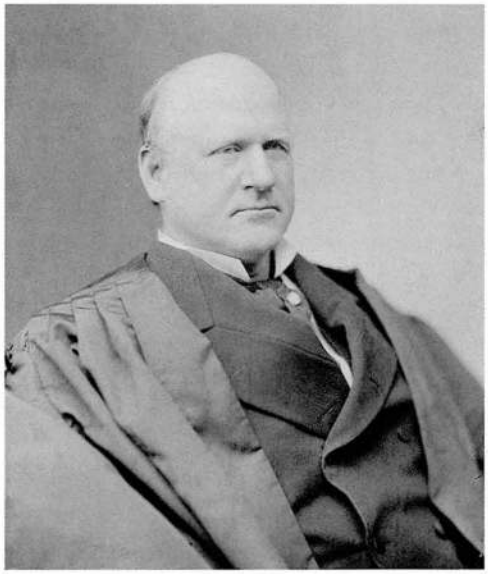
[119] Edward G. White, Earl Warren, *A Public Life*, 313–314 (1982).

[120] *Powell*, 395 U.S. at 550.

BOOK REVIEW

Paul Kens

Peter S. Canellos, **The Great Dissenter: The Story of John Marshall Harlan, America's Judicial Hero**. New York: Simon & Schuster, 2021, 495 pp. + acknowledgments, notes, bibliography, and index



Peter Canellos' new biography of John Marshall Harlan (above) examines the justice's dissents in cases involving commerce as well as race.

John Marshall Harlan, who sat on the Supreme Court from 1877 to 1911, is best known for his dissenting opinion in *Plessy v. Ferguson* (1896). There, Harlan stood alone among the justices as a defender of equal rights and opponent of the separate-but-equal doctrine. "Our Constitution is color blind," Harlan famously wrote. "The law regards man as man and takes no account of his surroundings or his color when his civil rights as guaranteed by the supreme law of the land are involved."[1] Peter S. Canellos has used this, along with other lonely Harlan dissents, notably in the *Civil Rights Cases* and *Lochner v. New York*, as the anchor for a new biography of the first John Marshall Harlan.[2]

The Great Dissenter is one of the most captivating judicial biographies I have read. This is partially due to Canellos' skill as a writer. He displays the journalist's ability to identify and capture a good story, and the talent to turn a phrase. But the thing that makes this book exceptional is how Canellos turns the subject of John Marshall Harlan into a poignant story of time and place in American history.

One way he accomplishes this is by weaving the story of Robert Harlan into the narrative. Robert, a man of mixed race and born into slavery, is commonly presumed to have been John's half-brother. Canellos deflects debate about the accuracy of that presumption by simply observing that, "A youthful sexual encounter with an enslaved woman could have made [John's father, James Harlan] Robert's father, but no one except Robert's mother would have known the truth."[3] Historians agree that James Harlan took an intensely personal interest in the young slave. He raised Robert, educated him, and then emancipated him. For Canellos, the truth of Robert's parentage is not as important as was the fact that Robert and John Marshall Harlan were connected early in their lives as part of the same household. Like earlier biographies by Tinsley E. Yarbrough and Linda Przybyszewski, Canellos factors this aspect of John's upbringing into the explanation of his evolution from former slave holder and opponent of abolition to advocate for racial equality.[4]

DOI: 10.1111/jsch.12287

However, Canellos goes a significant step further. Seesawing between the experiences of John and Robert as his story progresses, he adroitly weaves the life of Robert Harlan into the narrative. Including Robert in this way paints a vivid picture of the forces at play in the free Black community before the Civil War and the elite Black community after the war. It also gives the book additional human interest, for Robert led an unusual and eventful life. Among other experiences he risked travel through the Deep South in search of his mother, made a fortune in the Gold Rush, and became a successful businessman who raised, trained, and raced thoroughbred horses.

While at times this book may seem like the makings of a co-biography, Canellos does not forget that his subject is John Marshall Harlan. In the process of tracing John's life, he brings to light other factors that influenced the future Supreme Court justice's worldview. One was family. He was born into a prominent Kentucky family in 1833. Family lore has it that his father hoped to secure his son's destiny by naming him after "the great chief justice," John Marshall. Having graduated from Centre College and the law school of Transylvania University, it appears that he was destined to be a lawyer. John followed his father's faith in the Presbyterian Church and in the politics of the Whig Party, specifically, the ideals of Senator Henry Clay. It was a philosophy based on reverence for the founding and driven by a total commitment to preservation of the Union. It also featured a peculiar interpretation of American exceptionalism. One that valued self-government, liberty, and equality but, at the same time, opposed abolition on the belief that both abolitionists and advocates of slavery were willing to destroy the Union to get their way. In the mid-1850s, as the prospect of compromise on the issue of slavery and sectionalism dimmed, the Whig Party disintegrated. John found a new political home with the American Party, a party most remembered for its anti-foreign sentiment.[5] Given his early political views, it is unlikely that anyone who knew the youthful John Marshall Harlan would have predicted he would someday become a defender of racial or ethnic equality.

Early in the book, Canellos describes Harlan as, "... a man out of his time, preaching the virtues of a system that was collapsing under the weight of its own contradictions."[6] Harlan's strategy for dealing with those contradictions was to sanctify preservation of the Union, and to rationalize his opposition to the abolition of slavery as a necessity to avoid breakup of the Union. Surprisingly, Harlan remained committed to some version of this strategy of appeasement even during the Civil War and beyond. By the eve of the war, John Marshall Harlan, who was in his thirties, had already become a force in Kentucky politics. Canellos describes Harlan's participation in the intriguing events that kept Kentucky from joining the Confederacy. And then, with the battlefield threatening to reach his home, how Harlan raised a regiment of 900 Union volunteers and led the unit into several battles. He also covers Harlan's exploits as an officer in some detail, concluding it cemented Harlan's reputation as a leader. Of those wartime experiences, one stands out. Canellos tells the story of how, while inspecting the battlefield after a Union victory, Harlan came across the remains of Confederate General Felix Zollicoffer. General Zollicoffer was a Whig congressman from Tennessee, whose politics were nearly identical to Harlan's, including their love of the Union. The war, Canellos observes, had pitted against each other, two men who actually agreed, each armed and prepared to kill each other.[7]

It would be reasonable to think the breakup of the Union and the Civil War would have been enough to shake Harlan's commitment to the strategy of compromise and appeasement. But it was not. He stubbornly clung to those views throughout the war, and into the Reconstruction era. He

opposed the Emancipation Proclamation, and opposed the Thirteenth Amendment with the argument that abolition should not be imposed on Kentucky from the outside. In the presidential election of 1864, he supported Democratic candidate General George McClellan over Lincoln. He did not switch loyalties until 1868, when he threw his support to Republicans R. T. Baker for the governor of Kentucky and Ulysses S. Grant for president.

Canellos does not ignore the story of Robert Harlan during this time. Robert moved to England when the war broke out. With the Union victory he returned to Cincinnati, Ohio, where he became a leader of the Black community. As a spokesperson for that community in the Republican Party, Robert carried more political weight on a national scale than did John. It is likely that Robert's success story had much to do with John's evolution from an apologist for slavery to an advocate for racial equality and justice. Even so, John's disgust with the violent activities of radical segregationist, and especially in Kentucky, also explains his transition. Early in the book, Canellos writes, "...there was little doubt that [John's father] believed that African ancestry was not an absolute bar to achievement."[8] Assuming John adopted that belief, the segregationists' use of a theory of racial inferiority to justify violence and segregation would also have factored into his transition.

Kentucky Republicans quickly welcomed Harlan into their ranks. In 1871 they nominated him for governor. With the state dominated by Democrats, his defeat was all but preordained. But it provided the platform for his first public support for racial equality when, in a debate with the Democratic candidate, he declared that "... black people were made in the image of their creator, the same creator of the whites." Racial division, he argued, was a poison that would eat away the foundation of the state.[9] Republicans again drafted Harlan for their gubernatorial candidate in 1875, which he lost again. Nevertheless, in addition to providing a platform for his views on racial equality, Harlan's runs for governor set the groundwork for his appointment to the Supreme Court of the United States. When national Republicans met for their 1875 presidential convention, Harlan was the most influential member of the twenty-four member Kentucky delegation. He supported Benjamin Bristow through six hotly contested ballots. On the seventh he switched his support to Rutherford B. Hayes, bringing the other twenty-three members of the Kentucky delegation with him. That was all Hayes needed to win the nomination.

When Hayes won the even more hotly contested general election of 1876, John Marshall Harlan was one step closer to a seat on the Supreme Court. Canellos recounts how Robert Harlan, who remained well connected in the party, helped John obtain the nomination and guide it through the Senate. On Thanksgiving of 1877, John received a telegram announcing that his nomination had been voted out of committee, and his confirmation was assured. He took the oath of office on December 10, 1877.

Given the title, it comes as no surprise that the remainder of the book focused on cases in which Harlan dissents. By using this approach, Canellos avoids becoming entangled in a comprehensive analysis of constitutional doctrine of the era. Instead, he devotes his writing skills to painting a story of the background of the cases he highlights, thoughts about their implications, and insights about Harlan's relationships with other justices. The major cases he covers fall into two categories: those dealing with racial discrimination and those dealing with business and commerce.

While *Plessy v. Ferguson* is the most well known of his dissents, Harlan made his first stance against racial discrimination in 1883 when the Court overruled the Civil Rights Act of 1875. The majority ruled that, by enacting a law prohibiting

racial discrimination in privately owned public venues such as theaters, taverns, and restaurants, Congress had exceeded its authority to enforce the Fourteenth Amendment. It based its decision on a narrow reading of the Amendment's guarantee that "no state shall ... deny any person equal protection of the law." Given this language, it insisted that the Amendment prohibited only discrimination by the state, not discrimination by private parties. Harlan accused the majority of interfering with congressional authority to enforce the Fourteenth Amendment. Charging that the majority had misinterpreted the original purpose of the equal protection clause, he insisted that Congress could legislate to prevent "badges" of servitude that excluded people from the stream of everyday life and commerce.[10]

Thirteen years later, Harlan wrote his famous dissent in *Plessy v. Ferguson*. Canellos begins his chapter on *Plessy* with a story of Robert Harlan Jr. (Robert's son), a well-dressed and distinguished Cincinnati lawyer, being refused admission to the orchestra section of a theater.[11] The Court's decision in the *Civil Rights Cases* resulted in widespread racial discrimination. Discrimination and segregation were not limited to the southern states; it reached the Black social, economic, and intellectual elite of the North as well. Canellos describes the circumstances surrounding the *Plessy* case, from the time Homer Plessy was recruited to challenge the segregated railroad car law of Louisiana through the defeat of that challenge in the Supreme Court. He concludes that, "The Supreme Court had effectively removed the Constitution as an obstacle to even the worst excesses of racial discrimination, and the doors of opportunity would be slammed shut to African Americans for generations to come."[12]

Harlan dissented in several early twentieth-century cases, called the Insular Cases. These cases addressed the question of whether the Constitution applied in the territories the United States had obtained after the war with Spain. Although outcomes in the cases were mixed, Harlan objected when the Court reached a conclusion that citizens of territories were not entitled to the full rights of the Constitution. The majority's reasoning was based partially on the argument that, because people of these territories lived in "savage conditions," they did not possess "Anglo-Saxon" values.[13] Canellos emphasizes that Harlan's response reflected his commitment to racial equality. The constitutional guarantees for the protection of life, liberty, and property apply equally to everyone under the flag, he wrote, whatever their race or nativity, and regardless of whether they reside in the states or a territory.[14]

The Insular Cases also reflect a connection between Harlan's dissents involving race and those involving business and commerce. Canellos does not explore the source or evolution of Harlan's dissents in cases involving business and commerce to the same degree as he does those involving race. But a common thread throughout business and commerce cases traces back to a story he tells about a speech Harlan gave while a student at Centre College. He writes that Harlan liked to contrast the genius of the American system, with the people as sovereign, with the despotic reigns of abroad. Continuing, he observes that for Harlan, the "baronial castles and feudal prison houses" were emblems of Europe's despotic class system, which stifled people's natural yearnings for freedom.[15] This sentiment, which envisions popular sovereignty as a bulwark against despotism and as a guarantor of liberty, is present in Canellos' treatment of both the Insular Cases and the business and commerce cases. Dissenting during the Insular Cases, Harlan observed that the majority's decision was based on the idea that the "Anglo-Saxon" character—and not freedom or democracy—would safeguard the "real interest" of people in other lands.[16] Congress's claim

of authority to create any government it wanted in the territories, he complained, was so open-ended that it could appoint kings and queens to preside over its overseas possessions.[17] When the Court watered down the Sherman Antitrust Act in *United States v. E. C. Knight* (1895), Harlan accused the majority of construing Congress's power so narrowly as to deprive the democratically elected representatives of the tools to address a pressing national concern.[18] That same year, he dissented from the Court's decision overruling the national income tax in *Pollock v. Farmers' Loan & Trust Co.*[19] The majority decision, he said, represented a campaign by the rich to use their power to thwart the normal process of democracy.[20]

The most well known of Harlan's dissents in cases involving business and commerce came in *Lochner v. New York* (1905), five to four decision overruling a New York law that limited the hours bakers could be required to work. Justice Rufus Peckham's majority opinion relied on an implied constitutional right. "The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer," he wrote. He then explained that this right, later known as liberty of contract, is part of the liberty of the individual protected by the Fourteenth Amendment guarantee that no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor, he wrote, is part of the liberty protected by this amendment, unless there are circumstances that exclude the right.

Harlan and Justice Oliver Wendell Holmes each wrote dissents. With his hard-hitting and eloquent style, Holmes took aim at the heart of Peckham's opinion. Dismissing Peckham's premise that the Fourteenth Amendment contains a right of liberty of contract, he wrote, "This case is decided on an economic theory which a large part of the country does not entertain." Harlan was more willing to accept the idea that the Fourteenth Amendment could place a limit on state economic legislation. Instead, he attacked Peckham's presumption that a regulation is presumed to be unconstitutional "unless there are circumstances which exclude the right." To the contrary, he maintained that the judiciary should not overrule legislative enactments unless they are "plainly, palpably, beyond all question, inconsistent with the Constitution of the United States."[21] As Canellos points out, this statement reflects Harlan's views on the proper limit on the judiciary's power to overturn legislation. It also reflects the commitment to popular sovereignty and democracy reflected in his dissents to *E.C. Knight* and *Pollock*.

Canellos observes one other characteristic of Harlan's dissent in *Lochner* that ties the cases involving economics and commerce together with those involving race. As he did in *Plessy v. Ferguson*, Canellos writes, "Harlan delved into the real-life implications of the case—its practical effects."[22] Interestingly, the same can be said about Canellos's own technique of delving into the real-life circumstances, disputes, and implications of the cases he covers. Just as the first part of the book provides a captivating account of John Marshall Harlan's life, the second gives life to the decisions in which Harlan dissented. Experts may disagree with aspects of his descriptions, summaries, or conclusions. Some might even disagree that Harlan was *the* great dissenter, or with the book's subtitle, "America's Judicial Hero." Be that as it may, **The Great Dissenter** is a diligently researched and sincere portrayal of Harlan's life and his legacy as a Supreme Court Justice. It is also an exceptionally good read.

Paul Kens is a professor at Texas State University.

ENDNOTES

[1] Peter S. Canellos, **The Great Dissenter: The Story of John Marshall Harlan, America's Judicial Hero** (New York: Simon & Schuster, 2021), 3.

[2] *Civil Rights Cases*, 109 U.S. 3 (1883); *Lochner v. New York*, 198 U.S. 45 (1905); historians use "the first John Marshall Harlan" to distinguished him from his grandson, Justice John Marshall Harlan II, who sat on the Court from 1955 to 1971.

[3] Canellos, 43.

[4] Tinsley E. Yarbrough, **Judicial Enigma: The First Justice Harlan** (New York: Oxford University Press, 1995), 10–20; Linda Przybyszewski, **The Republic According to John Marshall Harlan** (Chapel Hill, NC: The University of North Carolina Press, 1999), 23, 112–13.

[5] Canellos, 90.

[6] *Ibid.* 92.

[7] *Id.* 137.

[8] *Id.* 47.

[9] *Id.* 182–84.

[10] *Id.* 264.

[11] *Id.* 329.

[12] *Id.* 315.

[13] *Id.* 381, referring to *Downes v. Bidwell*, 182 U.S. 244 (1901).

[14] *Id.* 389, referring to *Dorr v. United States*, 195 U.S. 138, 154 (1904).

[15] *Id.* 71.

[16] *Id.* 382, interpreting to *Downes v. Bidwell.*

[17] *Id.* 381–82.

[18] *Id.* 304, interpreting *United States v. E. C. Knight*, 156 U.S. 1 (1895).

[19] *Pollock v. Farmers' Loan & Trust Co*, 157 U.S. 429 (1895).

[20] Canellos, 323.

[21] *Ibid.* 408.

[22] *Id.* 407.

The Judicial Bookshelf

Donald Grier Stephenson Jr.

Introduction: Law, Politics, and the Supreme Court

Vital for rulers and ruled alike, respect for the law and the courts is foundational for government—American style. As Justice Arthur Vanderbilt of the New Jersey Supreme Court advised well over six decades ago:

> it is the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of their courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society.[1]

While maintaining this respect is a challenge for any political system, the challenge Vanderbilt highlighted is intensified in countries where courts possess the power of judicial review, as in the United States. Judges of constitutional courts enforce fundamental norms against policies preferred by other officials who are usually popularly elected or accountable in some way to those who are. Thus, an antinomy arises: the fair and even administration of justice versus the political dimension of justice.

On the one hand stands the goal of "a government of laws and not of men."[2] "Courts are the mere instruments of the law, and can will nothing,"[3] declared Chief Justice John Marshall in a self-effacing denial. On the other hand is an acknowledgment of judicial volition: that judges are not mere oracles and that courts affect the allocation of power. "We are under a Constitution, but the Constitution is what the judges say it is. . .,"[4] asserted future associate justice and chief justice Charles Evans Hughes while governor of New York. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law," declared Oliver Wendell Holmes Jr., while a member of the Supreme Judicial Court of Massachusetts.[5] "In law, also, men make a difference. . . . There is no inevitability in history except as men make it,"[6] avowed Felix Frankfurter in the year of his appointment as associate justice. A century earlier the

DOI: 10.1111/jsch.12288

astute Alexis de Tocqueville had observed that "no other nation ever constituted so powerful a judiciary as the Americans. . . [without which] the Constitution would be a dead letter."[7]

While scholars may routinely apply the adjective "political" to the Court, some people find the pairing unseemly. The reaction may be understandable because Americans frequently use the word "political" to refer to partisan politics (the struggle between political parties to control public offices and the nation's destiny) or to policies that result from illegal or otherwise nefarious influences. In both senses of the word "political" (partisan combat and corruption), Americans properly expect the federal courts to be "above politics." (In states with elected judiciaries, by contrast, judges are frequently thrust into fund-raising and partisan combat by necessity.)

Nonetheless, a confluence of circumstances in recent years has made the claim of a political Court in the partisan sense more convincing and more difficult to rebuff. Some decisions may appear overly partisan because the voting among the justices often aligns closely with the party of the appointing president, just as confirmation votes in the Senate have recently mirrored party lines. In contrast, socially and culturally provocative rulings such as *Brown v. Board of Education*,[8] *Roe v. Wade*,[9] and some on religious freedom and criminal justice that agitated the body politic in various ways several decades ago were decided by majorities comprised of Justices where the appointing presidents reflected a partisan mix. In such situations, even though journalists and commentators might have referred to justices as liberal or conservative, activist or restraintist, a decision on a highly salient issue would lack a clear partisan identification.[10]

Whether the current pattern persists or reverts to what might be described as the healthier climate of earlier days, the Supreme Court remains unavoidably "political" in a fundamental sense: The justices help to shape public policy through the process of deciding cases. Seen in this light, the Court has been political from nearly the beginning, as recent additions to judicial literature illustrate.

The Spirit of the Constitution

Sooner rather than later, someone undertaking study of the Supreme Court encounters *McCulloch v. Maryland*,[11] decided near the end of John Marshall's second decade as chief justice. The case raised the combined issues of congressional power and clashing sovereignties after the state of Maryland levied a tax on the Second Bank of the United States. Did the Constitution permit Congress to charter a bank? If so, could a state tax the bank?

For Marshall, the necessary and proper clause of Article I in the Constitution gave Congress a discretionary choice of means in implementing granted powers, and the Tenth Amendment in no way limited this freedom of selection. As a result, Congress possessed not only those powers expressly granted by the Constitution but an indefinite number of others as well, unless prohibited by the Constitution. Moreover, the breadth that the Constitution allowed in a choice of means was largely a matter for Congress, not the judiciary, to decide. Thus, Marshall asserted not only the proposition that national powers should be generously construed but also the equally decisive principle that the Tenth Amendment did not create in the states an independent limitation on national authority. In reply to the argument that the taxing power was reserved to the states by the Tenth Amendment and hence could operate even against a legitimate mechanism of national power, Marshall went out of his way to deny the power of states to tax national instrumentalities. A part of the union could not be allowed to cripple the whole. Anticipating the posture a much later Bench would assume, the Chief Justice's opinion for the Court thus

suggested a special responsibility for itself to intervene when majoritarian politics undermined the Constitution or targeted entities that were themselves politically defenseless.

The ruling has long been regarded as a major block in the constitutional foundation of both congressional authority and federalism. Moreover, and for that reason, *McCulloch* has been a favorite focus of biographies of Marshall, commentaries, and case studies. To that list one should add **The Spirit of the Constitution** by David S. Schwartz of the University of Wisconsin Law School.[12] The subtitle—"John Marshall and the 200-Year Odyssey of *McCulloch* v. *Maryland*"—suggests that the book is another case study.

Schwartz, however, has not written a case *study*. Perhaps his thought-provoking book could better be called a case *tracker* in that the operative word in the subtitle is "odyssey." Disconnected from its Homeric origins, the term now usually refers to a wandering journey with many changes of fortune. Indeed, from Schwartz's account of the life of *McCulloch* over two centuries, "odyssey" is precisely the noun to use in reference to this case. What Schwartz has shown is that this Supreme Court decision, now widely regarded as reposing among the most important, has not always been accorded so prominent a place in the constitutional pantheon. Thus, his book indirectly invites a similar probing of other foundational decisions.

Schwartz alerts the reader in the Preface to expect a contrarian volume: "a work of revisionism that creates potential anxiety for both its author and its readers."[13] The need for that trigger warning becomes apparent as the Introduction opens with a flashback to the Courtroom in 2012 with arguments in *National Federation of Independent Business v. Sebelius*[14] on the constitutionality of the Affordable Care Act, the signature piece of legislation of President Barack Obama's first term. Drawing from that setting, Schwartz finds it curious that counsel and Justices stressed the importance of the meaning of *McCulloch* for the correct resolution of the case. "Why did an 1819 case about a bygone institution . . . have any bearing on healthcare legislation in 2012?"

The answer, Schwartz explains, "reveals a basic feature of our constitutional system, but also a mystery."[15] Both, he believes, stem from one of the memorable statements in Marshall's opinion, a sentence from which the book draws its title: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and *spirit of the constitution*, are constitutional."[16] Significantly, this sentence came fourteen pages after Marshall prepared the reader for what was to follow regarding implied powers: "In considering this question, then, we must never forget that it is a *Constitution* we are expounding."[17]

For Schwartz, the "basic feature" of the American political system is federalism: the distribution of powers between the national and state governments. Moreover, debates over federalism "have done more to shape American constitutional law than any other issue" as have, one might add, the parallel question about the scope of, and limits on, the powers of Congress. Nonetheless, the "mystery" that remains is why these ongoing debates are thought to be "authoritatively answered" by *McCulloch*. Yet the mystery turns out to be an easy one to unravel in that *McCulloch* is "taught to every law student as *the* foundational case... [that] has effectively displaced the views of the Framers as the authoritative source on the reach of congressional power."[18] As such, *McCulloch* has become one of the major underpinnings of American constitutionalism and part of a civic religion as well.

That religion in turn "sets forth two fundamental principles that define our system: a strong central government recognized by all to be the supreme, unifying authority and

wielding the power to address all national problems; and a Supreme Court with the authoritative and final say over what the Constitution means." Acknowledging that this standard story "has some truth to it," the author insists that the account nonetheless falls short because it "oversimplifies matters to an extent that obscures much of the truth of our constitutional history."[19]

McCulloch's status is overrated and praised for its brilliance, the author contends, even though the opinion "did not develop a single new idea."[20] Instead, if a "sacred text" is needed, Schwartz strongly prefers Alexander Hamilton's memorandum to President George Washington in support of the First Bank of the United States.[21] "The chartering of the bank" "is an astounding precedent—for implied powers, for national sovereign powers, for the power to create a major administrative agency to conduct the business of government. The *McCulloch* opinion was merely a pale echo of that precedent. The fact that constitutional lawyers have substituted *McCulloch* for the original Bank charter as the defining statement of constitutional law," Schwartz continues, "speaks volumes about our acceptance of judicial supremacy."[22]

The reader is, therefore, not surprised when Schwartz reveals that *McCulloch* did not begin life as a canonical decision. From 1819 to 1892, the case was "rarely invoked" as a statement about congressional power outside of the context of controversies over issuing paper money. It was instead cited most frequently (thirty-six times) in cases involving intergovernmental immunity with respect to taxation. Moreover, even though the decision has been regarded in recent years as a "creative force, shaping constitutional debates and guiding constitutional development, . . . it neither produced nor even encouraged expansive national policies for decades."[23]

Schwartz's comments about the visibility of the case and its use by the Court across the years are helpfully illustrated by two graphs in Appendix 1. Figure 1.1 shows the total citations to the case in majority and separate opinions in the Supreme Court from 1819–1834 to 2005–2016. Figure 1.2 in turn displays the percentage of Supreme Court cases citing *McCulloch* in either majority or separate opinions during the same time frames.[24] Availability of such data in the modern era has surely been facilitated, if not truly been made possible, by digitization of the Court's work. Similarly helpful and unique is Appendix 2, which is a complex table of terminology with respect to the contested interpretations of "necessary and proper" from the key clause of Article I, Section 8. Complete with page numbers from the opinion, the left side of the table highlights Marshall's interpretation, and the right side highlights Maryland's.[25]

Nonetheless, while such data are instructive, it is equally instructive to keep in mind that Marshall's opinion hardly went unnoticed by his contemporaries. As Charles Warren wrote with considerable understatement, the "importance of this decision was at once appreciated. . .."[26] Indeed, Warren devotes some fifteen pages to newspaper and pamphlet commentary that followed publication of Marshall's opinion.[27] *McCulloch* apparently ignited controversy and received a brutal verbal lashing in several states, particularly in Virginia. After the case came down on March 6, the *Richmond Enquirer* published two essays before the end of the month over the pseudonym "Amphictyon" (perhaps Judge William Brockenbrough) attacking the Chief Justice's thirty-seven-page opinion. Marshall then published a response over the signature "A Friend to the Union" in the Philadelphia *Union* in April.

There soon appeared in the *Enquirer* four essays more hostile than the first pair. These were signed "Hampden" and were probably written by Judge Spencer Roane of the Virginia Court of Appeals—someone Marshall once called the "champion of dismemberment."[28] Marshall then felt

compelled to reply again. Beginning in June, a nine-part response to Hampden appeared in the *Gazette* of Alexandria, Virginia, over the pen name "A Friend of the Constitution." Custom may have driven Marshall to defend his opinion anonymously, but concern for the future of the nation overrode any proprieties he may have had about resorting to the newspapers as an extra-judicial forum.

Yet endorsements and condemnations of Marshall's handiwork only marked the beginning of the odyssey that Schwartz displays across thirteen article-like chapters,[29] which are in turn arranged into three parts. The four chapters of Part I deliver on the author's earlier warning about a revisionist interpretation of Marshall Court jurisprudence, insisting that *McCulloch* was "deeply ambiguous."[30] It is also in Part I that the book introduces Marshall's equally important opinion in *Gibbons v. Ogden*[31] that came down five years after *McCulloch*. Invalidating a steamboat monopoly granted by New York, this landmark ruling potentially took on added meaning in light of the doctrines of national supremacy and implied powers that had been central in *McCulloch*.

In *Gibbons*, Marshall could have resolved the case simply by finding that both state and nation had acted within their powers, but because the state law conflicted with a federal licensing act, it must give way. He chose instead to examine the nature of the commerce power before finding the existence of a conflict. Commerce, he declared, was more than traffic; "it is intercourse," and comprehended navigation. Moreover, commerce "among" the states did not stop at state lines but "may be introduced into the interior."[32] The power to regulate was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."[33] Although the states retained authority to enact inspection, pilotage, and health laws, even here Congress could enter the field if it chose.

While *Gibbons* is traditionally read as having recognized an expansive reservoir of national legislative power,[34] Schwartz offers a competing interpretation that depicts this ruling as a retreat from "the more expansive ideas of implied powers expressed in *McCulloch*."[35] Noting that neither William Wirt nor Daniel Webster (counsel for Gibbons) mentioned "their great Supreme Court victory of just five years earlier," Schwartz adds that Marshall likewise refrained. "By making navigation an element of a definition of the word commerce in the Constitution, Marshall made the potential scope of the Commerce Clause more concrete and *smaller* in order to reduce the potential displacement of state law were the Court ever to adopt an exclusive commerce theory. By 1824, *McCulloch* had become more of a conceptual albatross than a source of pride."[36]

The four chapters of Part II recount the "disappearance" of *McCulloch* from Supreme Court jurisprudence during the Jacksonian era alongside Schwartz's claim that Chief Justice Roger B. Taney, Marshall's successor, essentially overruled *McCulloch* in fact, if not in name.[37] *McCulloch* then gradually reemerges later in the nineteenth century, but those "glimmerings" because of the demands of Reconstruction appear mainly within Congress and only later in decisions by the Court. The final chapter of Part II explains that "the Supreme Court's recognition of *McCulloch* as a canonical case arose as part of a John Marshall revival movement designed to protect the Court's assertion of judicial supremacy in anticipation of Populist political attack."[38]

Part III focuses mainly on the twentieth and twenty-first centuries, a time during which *McCulloch* has been uniformly regarded as a canonical case. Disagreements have nonetheless persisted over its meaning. For progressives and New Dealers, the decision stood as a more than adequate source of congressional powers to address all manner of national problems. Conservatives

in contrast took a view of Marshall's opinion that construed national legislative powers narrowly. Accordingly, the mid-twentieth century, particularly the 1960s, witnessed the high water mark of the implied powers doctrine. Most recently, Schwartz maintains, the Court has shown signs of "bending *McCulloch's* nationalism back, at least slightly, toward a renewed emphasis on limited national powers"[39]—an attitude witnessed partly in the Court's treatment of the Affordable Care Act,[40] litigation Schwartz referenced as his book began.

From the author's perspective, it is the odyssey of *McCulloch*, viewed broadly, that captures the spirit of the Constitution. If that "spirit" is "an expression of an unwritten interpretive ethos, then that spirit is something that has been transfigured repeatedly throughout the eras of U.S. constitutional history." That is, the case has been "interpreted, or ignored, to fit the varying spirits of the Constitution."[41] As the author recasts the same point in the concluding chapter, the interpretation of *McCulloch* "through successive generations tells us much about each generation's spirit of the Constitution. The truth is that *McCulloch* did not make great constitutional law. Rather, constitutional law made *McCulloch* great."[42]

Breaking Down Barriers

Easily classified as a case study is **Breaking Down Barriers** by David W. Levy, emeritus professor of history at the University of Oklahoma and author of a two-volume history of his university.[43] Levy's most recent book explores the Supreme Court's decision in *McLaurin v. Oklahoma State Regents for Higher Education*[44] and is as much a study in a drama in higher education as it is a study in civil rights. At a different level the book offers a window into the life and character of George McLaurin.

McLaurin's case came down four years before *Brown v. Board of Education*, surely among the most consequential high court decisions in the post–World War II era. Most important, *Brown* unequivocally interred the separate-but-equal rule from *Plessy v. Ferguson*[45] that fifty-eight years earlier had bestowed constitutional blessing upon state-mandated racial segregation. Although a railroad segregation case, *Plessy's* most pervasive and damaging effects ironically were in public education where the rule was respected far more in breach than in observance. In telling the story of George McLaurin's struggle to achieve admission on a racially equal basis to the graduate school at the University of Oklahoma, Levy has provided a detailed, engaging, and heavily researched account that draws not only from the expected judicial sources but from state and university archives as well. Overall, his book is a reminder that landmark rulings by the Supreme Court such as *Brown* only rarely arrive as a bolt out of the blue or without some fore-notice. Indeed, one senses from Levy's account that the decision in McLaurin's case may well have helped to make *Brown* possible.

Breaking Down Barriers consists of eight numbered chapters, a prologue, and an epilogue. The prologue nearly instantly grips the reader's attention with a description of McLaurin's registration at the University of Oklahoma in Norman and his arrival in October 1948 for his first class, educational psychology, which met in room 104 of the old Carnegie Library. Here an unexpected scene unfolds. In the author's depiction, McLaurin "was provided with a chair and a small desk, not in the actual classroom itself, where the white students would be siting, but in a small, adjoining 'anteroom' or 'alcove'—his attorney would later describe it (erroneously) as a 'broom closet'. He would be able to see the blackboard and the professor at a 45-degree angle but technically he would be 'separated' from the other students in accordance with Oklahoma segregation laws."[46]

As Levy continues, the "photographers went into action, taking from various angles their shots of McLaurin seated at his desk. Those pictures! Those incredible pictures! They were breathtaking, horrifying, devastating, heartbreaking, easily worth the proverbial thousand words. The elderly black man sitting alone, serious and dignified and dressed in suit and tie. The white students looking indifferent as if they were somehow superior and knew it—as if the old black man was not worthy of their notice. As if they were in danger of being somehow tainted by too close contact with a man who had been teaching school since before they were born, a man trying to attend a university that was younger than he was." The author then adds that the pictures "failed to show that before many days had passed many of McLaurin's fellow students would prove to be friendly and sympathetic."[47]

Notably, barely five pages into the book, the reader finds that Levy has injected two superficially unrelated points that deserve mention: McLaurin's age and the photographs taken when he first attended class. With respect to the latter, surely one or another of the photographs of McLaurin seated in the alcove remain to this day one of the most familiar images from the earlier decades of the campaign for racial justice in the United States, as one frequently finds McLaurin's picture among the illustrations in books on civil rights.

With respect to McLaurin's age, Levy explains that while it is certain that McLaurin was reared in Mississippi, "considerable confusion" exists about the date of his birth[48]—confusion Levy largely attributes to McLaurin himself who seems habitually to have listed his birth year differently in various entries such as his draft registration. Levy, nonetheless, accepts and works with the Social Security Death Index that shows a birth date of September 16, 1887, meaning that McLaurin was sixty-one at the time of his enrollment in 1948. Perhaps McLaurin may not have thought of himself as "old," in Levy's terminology, but he certainly would have appeared "old" to the students sitting nearby. Nonetheless, the author dismisses as an "exaggeration" Thurgood Marshall's remark to journalists that McLaurin was sixty-eight in 1948.[49]

For the reader the passages quoted above about McLaurin's first day of classes seem to be an ending. Yet they only mark the end of the book's beginning. How could such a bizarre situation like the alcove arrangement have developed? The answer to that question comes later in the book.

Levy's Prologue is followed by the first numbered chapter, "A Tradition of Segregation." This substantial and unexpected essay of some twenty pages reviews the settlement and early history of the region that became the Oklahoma Territory and its admission into the Union in 1907 as the forty-sixth state. While each of today's fifty states may have a unique pattern of settlement, Oklahoma's surely falls among the more unusual. While indigenous peoples once populated in varying degrees all regions of what became the United States, the Native American population in what is present-day eastern Oklahoma grew substantially during the 1830s and later following the forced removal of thousands of Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles from southeastern states. These displaced people were from the "civilized tribes,"[50] so termed given their adoption or practice of aspects of white culture such as agriculture, constitutional government, literacy, and Christianity. Moreover, one part of white society they had embraced was enslavement of African Americans. As many as 5000 slaves thus endured the forced migration along with their masters. This upheaval laid the basis for a substantial black presence in the social and political life of Oklahoma.[51]

The first session of the newly formed territorial legislature in 1890 debated what to do about race and the public schools. Levy

explains that the presence of Republicans and a Republican governor prevented Democrats from imposing strict segregation initially with the result that a county-option plan was adopted instead. Accordingly, voters would decide between one or two school systems, with the latter usually prevailing. By the end of the decade, the situation for blacks regarding other facets of life worsened further as the territory embraced the "orgy of segregationist measures"[52] spreading through the southern states, a trend that accelerated after the Supreme Court's ruling in *Plessy*. Not only were racially discriminatory measures adopted for the ballot box but Oklahoma later became the first state in the union to require racially separate telephone booths for whites and blacks. Thus, it was hardly surprising that among the first responses in Oklahoma to *Plessy* was the territorial legislature's establishment of a higher education opportunity for black residents called the Oklahoma Colored Agricultural and Normal University, located in the rural community of Langston. As Levy explains, the result of the adoption of such measures meant that the doctrine of separate but equal "became the standard way to argue the validity of measures separating races, and, at the same time, the allegation that in actual practice the separated facilities were not equal became the standard way to argue against particular segregated arrangements."[53]

Nonetheless, as the author insists, the weight of a persistent past must have made it apparent "that any person, white or black, who had the temerity to challenge Oklahoma's tradition of segregation and white supremacy was enlisting in a battle where the risks were high and the chances of success dubious. . . . Segregation was established by [entrenched] custom and sanctified by tribal, territorial, state, and municipal law. It was supported by the judicial system, the state's newspapers, and most of the state's churches. It was . . . enforced by social and economic coercion. And it was sustained, when it was thought necessary, by physical intimidation and unrestrained violence"[54] as the Tulsa race massacre of 1921 had vividly illustrated.

That legacy combined with segregation that persisted through the 1940s surely made George McLaurin's efforts remarkable, yet after the author's extensive contextual detour in chapter one, chapter two ("Pioneers on the Road to Desegregation") delves into the efforts of those before 1948 who had been active in the fight against state-mandated racial segregation, especially in education. Prominent among them were individuals such as Charles Houston, Roscoe Dunjee, Thurgood Marshall, and Charles Lee Carter. Their efforts through the legal arm of the National Association of Colored People (NAACP) over many years took aim at segregated education because of the realization that if education afforded black children was not equal to what white children received, the former, as adults, would be relegated to a permanent underclass. Moreover, there was also the belief that the best chances for success in breaking down barriers lay in attacking segregation in graduate and professional education rather than schooling at the lower levels and to proceed initially in states that had not been part of the old Confederacy.

Accordingly, in chapter two Levy takes another detour to explore the actions against states that mandated segregated higher education all the while attempting to comply with *Plessy* by providing scholarships to black students to attend graduate school out of state. These efforts resulted in the Supreme Court's 1938 decision in *Missouri ex rel. Gaines v. Canada*[55] that invalidated the practice. Rejecting the state's contention that the scholarships provided substantial equality to black students, Chief Justice Charles Evans Hughes pointed out that the basic consideration was not as to "what sort of opportunities other states provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely on the

ground of color."[56] Although Oklahoma had a similar scholarship policy for the graduate and professional levels, remarkably a full decade passed before that too was ruled a violation of the Fourteenth Amendment in *Sipuel v. Regents of the University of Oklahoma*, involving admission to the university's law school.[57]

Those who thought that *Sipuel* would ease McLaurin's enrollment in graduate courses at the University of Oklahoma, however, were soon disappointed. First, adhering to state law, university officials, perhaps not unexpectedly, refused to admit McLaurin. Second, once legal action in response began, a three-judge federal district court issued an equivocal ruling,[58] declaring that "insofar as any statute or law of the State of Oklahoma denies or deprives the plaintiff admission. . . it is unconstitutional and unenforceable." To this conclusion of law, Levy notes that the judges added a "troublesome"[59] additional sentence: "This does not mean, however, that the segregation laws of Oklahoma are incapable of enforcement."[60] In the author's assessment, the court "obviously felt that—except in a case like McLaurin's where the laws infringed upon an individual's constitutional rights—overturning the segregation laws of the sovereign state of Oklahoma was beyond its jurisdiction."[61] Significantly, the added remark left open room for further evasive action that persisted until intervention by Justice Wiley Rutledge at Thurgood Marshall's insistence.

Attempted compliance with the law is largely the subject of chapter four: "Twenty-One Months of Hell." University administrators now faced a conundrum: How could they comply with the district court and still maintain separation of the races as required by state law? In other words, how does a university admit an African American and still remain a segregated institution? As a solution Roscoe Cate, finance advisor to university president George Cross, suggested a distinction between complete and partial segregation. Given the court's directive and the academic calendar, complete segregation could be arranged for the second semester, but that would entail setting aside a classroom for McLaurin's exclusive use and designating a qualified member of the faculty to teach him. However, as Levy explains, "the regents, unable or unwilling to grapple with the intricacies of complete segregation, threw the responsibility to . . . Cross" who worked out what he referred to as "disagreeable details"[62] to retain at least partial segregation and thus perhaps to mollify segregationist legislators.

As Levy explains, all "of McLaurin's classes would be held in Room 104, and for all of them he would sit at his own desk in the adjoining alcove. He could enter the library stacks at the same time as white graduate students, but he would have his own table in the library where no one else could sit, and he could sit at no other table. He was, similarly, assigned his own table in the Student union. He could sit nowhere else and no white student could sit at his table. The 'Jug,' a snack shop in the union, was open to him for lunch between noon and 1:00 P.M., and no white student could eat there during that hour. A toilet on the first floor of the Carnegie Building [site of his classroom] was set aside for his exclusive use. It was under such conditions that the first black student in the history of the University of Oklahoma began his studies."[63]

Nevertheless, McLaurin had set a small upheaval in motion. Despite the restrictions imposed on him, other black students enrolled in graduate classes and were subjected to the same arrangements. More students in turn created more situations where administrators had to navigate "between the demands of state law those of decency and common sense."[64] Laboratory sessions in particular called for creative solutions. "In one of them," drawing from university memoranda, Levy reports that "a black student sat on one side of the laboratory desk with three white

students on the opposite side facing him." In another situation, the black student "sits in an area surrounded by the wall and two tables forming a 'U' to separate him from the white students." In another, "the desks are arranged around the room against the wall with students facing the wall. The negro student in this class is separated from the other students by the sink and a vacant seat."[65]

At a distance of more than seven decades, such "details" appear to reach the heights of ludicrousness and had they not stemmed from efforts to shun another human being would be useful fodder for a skit on "Saturday Night Live." For anyone with administrative experience in higher education, they would truly be catalysts for nightmares and heartburn.

McLaurin's case in the Supreme Court occupies the bulk of chapters six and seven. Decided on the same day as *Sweatt v. Painter*,[66] perhaps a more familiar case that involved a *Plessy*-inspired law school in Texas, McLaurin's case presented both Court and his counsel with what Levy labels a dilemma. Were the Court to side with McLaurin, how could it do so and also leave *Plessy* intact? As Levy notes, the university had come as close as possible to a conscientious application of *Plessy*. Yet few, if any, among McLaurin's counsel from the NAACP believed the Court in 1950 was ready to inter *Plessy*, given the mammoth ramifications of such a move. But to acknowledge that Oklahoma had passed the Plessy test might lead the Court toward the position taken by the lower court that Oklahoma had not undermined his right to an equal education. Such an outcome would then encourage other southern states to replicate Oklahoma's methods of dealing with black applicants at the college and graduate school levels. Levy notes that this was the reason some black leaders had been wary even of moving the case forward, fearing a reinforcement of *Plessy* that would "set back race relations for years to come."[67]

The Court's solution, as explained in Chief Justice Fred Vinson's opinion for a unanimous Bench, was to side with McLaurin not because *Plessy* was wrong but because McLaurin's treatment violated the equal protection of the laws mandated by the Fourteenth Amendment. That treatment set him apart and handicapped his pursuit of a graduate education. That is, McLaurin won because Oklahoma had not lived up fully to *Plessy's* equality component. Vinson noted a larger social purpose as well: "Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State imposed restrictions which produce such inequalities cannot be sustained."[68] For those who read the opinion closely, the Chief Justice had left *Plessy* hanging by a thread.

The Epilogue relates that after his litigation concluded, "McLaurin retreated to near anonymity and solitude. He abruptly dropped his pursuit of a doctorate and never returned to the university. As a notably private person he avoided the telephone and was cautious about his rare public statements."[69] Accordingly perhaps, he seems to have taken no public part in the civil rights movements of the late 1950s and 1960s. Perhaps some of the reticence stemmed not from his personality but from what Levy describes as a falling out between McLaurin and leaders within the NAACP, Thurgood Marshall and Roscoe Dunjee in particular. However, Levy notes that by the time of McLaurin's death in Los Angles in 1968,[70] some of the earlier hard feelings with NAACP leadership had apparently been "forgotten."[71]

The Journey to Separate but Equal

In 1872, slightly more than seventy-six years before George McLaurin first attempted to enroll at the University of

Oklahoma, Madame Josephine Decuir, went aboard the riverboat *Governor Allen* for the seventeen-hour journey up the Mississippi River from New Orleans to Hermitage Landing in Pointe Coupée Parish. A French-speaking woman of color, she was accompanied by Eugene K. Washington, a New Orleans attorney who was assisting Decuir with matters arising from the succession of her late husband's property. However, John Benson, captain of the steamer, denied Decuir access to the cabin reserved for white women and assigned her instead to the "bureau," space then typically set aside on rivercraft for non-whites and a term ironically derived from the Freedmen's Bureau established by Congress after the Civil War.

Madame Decuir was especially distressed because an important difference between the levels of service offered whites and persons of color was that separation of the sexes was not observed in the area designated for the latter. This racially based denial of service on *The Governor Allen's* regular route from New Orleans to Vicksburg resulted in a suit by Decuir against Captain Benson in state court which awarded her $1,000 in damages, an outcome upheld by the Louisiana Supreme Court. In an appeal to the U.S. Supreme Court, Benson's widow and administratrix Eliza Jane Hall prevailed in 1878 when the case came down as *Hall v. Decuir*.[72]

An account of Decuir's litigation and much more fills **The Journey to Separate but Equal** by Jack M. Beermann of Boston University School of Law.[73] The reader quickly discovers that this extensively researched volume of ten numbered chapters ventures well beyond the typical case study in that it includes a ten-page appendix on the dormant commerce clause and in the tenth chapter a fulsome review of virtually all other late-nineteenth-century decisions by the Supreme Court dealing with racial equality. The book should appeal not only to those interested in the judiciary and civil rights but also to anyone curious about life and culture in south Louisiana during the immediate post–Civil War era.

Beermann believes the case deserves book-length treatment for at least two reasons. *Plessy* may have been "the pinnacle of the Supreme Court's embrace of separate but equal, but *Hall* had planted important seeds two decades earlier."[74] Significantly both cases involved transportation, one by water and the other by rail. Transportation in turn involves movement of persons, personal effects, and goods. Movement therefore both entails and facilitates freedom. Indeed, in the next century that was Justice William Brennan's point about the discriminatory legislation at issue in *Shapiro v. Thompson*. "This Court long ago recognized that the nature of our Federal union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulation which unreasonably burden or restrict this movement."[75]

Second, while *Plessy* remains among "the more studied nineteenth century Supreme Court decisions, *Hall v. Decuir*, its history, and its context, have received little attention beyond a small group of legal historians."[76] Certainly, while the case is frequently mentioned in studies of the late-nineteenth-century Court or in books and articles on racial equality, the "mention" is usually not followed by serious commentary. Thus, only rarely does one find the case displayed even with the treatment it received in Richard Bardolph's **The Civil Rights Record**, an invaluable compendium of documents and commentary published in 1970.[77]

Accordingly, Beermann insists that his book "aims to correct that oversight through a detailed study of the litigation record of the case as well as an examination of the lives and circumstances of the parties, attorneys, and judges in this fascinating period in

Louisiana history."[78] With a careful blending of the legal and sociological aspects of Decuir's case, the reader finds validation of an observation made many years ago by historian C. Vann Woodward: "[I]n most parts of the South race relations during Reconstruction could not be said to have crystalized or stabilized or to have become what they later became. There were too many crosscurrents and contradictions, revolutionary innovations and violent reactions."[79]

The author addresses forthrightly in the Introduction the subject of "terminology"—a defensive consideration essential for author and helpful to reader today with any race-laden book. "[Concerning the use of the terms *of color*, *colored*, and *Black*, in general, during the time period captured in this book, mixed-race people like Madame Decuir were referred to as 'colored' or 'of color,' while darker-skinned people of African descent were referred to as 'Black' or 'Negro' (when not referred to by more patently offensive terms). I have often employed the terms *colored* and *of color* the way they would have been used in the nineteenth century and have used *Black* to refer to those who would have been so characterized at the time. *Negro* appears only in quotations or when reporting others' use of the term, along with unfortunately some even more offensive terms. At times, the term *of color* appears as a reference to non-White people in contemporary usage. By describing people in racial terms, I do not mean to suggest or endorse the existence of race as a personal characteristic separate from the social conventions of which it is a part. Race is, in my view a socially constructed tool of stratification and subordination that does not correspond to material reality."[80] Similarly, Beermann does not use the term Creole in the book "except when reporting others' use of it. That is by choice," he explains, given the varied usages of the word to refer to different groups of people. Thus, to "avoid confusion," he avoids the word altogether.[81]

Given the racial focus of much of the book, the reader should not be surprised to find elements of irony. Although denied service because of the color of her skin, neither Madame Decuir nor any of her known forebears had ever been enslaved. Nonetheless, on board the riverboat she was treated as belonging to a class of people now enjoying their first tastes of freedom. Furthermore, prior to 1865 and the Thirteenth Amendment, she and her husband had owned numerous slaves on their plantation—the property that had occasioned her travel on *The Governor Allen*. Finally, given that Madame Decuir had traveled widely in Europe prior to the Civil War, she could validly think of herself as socially superior to at least some of the white women who had been admitted to the ladies cabin for the overnight passage.

Nonetheless, a reader of this review essay unfamiliar with Louisiana history during Reconstruction might understandably wonder about the legal basis for Madam Decuir's initially successful suit against Captain Benson. As suggested by Vann Woodward's observation noted above, there were post-war constitutional and statutory protections already in place upon which her attorney relied. The state constitution of 1868 barred discrimination on the basis of race or color in places of public accommodation or on public conveyances. Furthermore, a statute enacted in 1869, while allowing operators of common carriers to exclude unruly passengers, expressly provided that rules and regulations of behavior "make no discrimination on account of race or color."[82]

When the case was heard and decided in the five-member Louisiana Supreme Court in 1874,[83] Benson's attorney made two constitutionally based claims: that the statute had taken property without due process of law under the recently ratified Fourteenth Amendment, and that the statute interfered with Congress's authority over interstate commerce. Moreover, in the background at the trial and state appellate levels was

insistence that Madame Decuir had suffered no true affront because the separate quarters for whites and non-whites on the riverboat were essentially equal, a point stressed in Justice William Wyly's dissent in the state's high court. That assertion Beermann considered factually baseless, but it nonetheless may have served as at least part inspiration for the title of his book. As for the commerce argument, Chief Justice John Ludeling's opinion affirming the trial court insisted that as an anti-discrimination measure the state statute did not regulate commerce.

Chapters seven and nine principally focus on the preparation for review by the U.S. Supreme Court and the Court's decision. The case was originally docketed during the October 1874 Term, but was later carried over to 1875, 1876, and 1877 Terms—delay due not only to the Court's backlog but to the death of Captain Benson, an event that meant the Court had to be persuaded to substitute Eliza Jane Hall as plaintiff in error. Beermann reports that Chief Justice Morrison R. Waite's papers show that after proceeding without oral argument, the Court made its preliminary decision on October 26, 1877, voting five-to-three to reverse, with Chief Justice Waite, Justices Joseph P. Bradley, Stephen Field, Noah Swayne, and Nathan Clifford voting to reverse, and Justices Ward Hunt, William Strong, and Samuel F. Miller voting to affirm. (The author incorrectly includes "David Dudley Field" as a voting member of the Court in the case, instead of his brother Justice Stephen J. Field, an error Beermann first made nine pages earlier with respect to a different case.[84]) There were only eight justices at the time *Decuir* came down because of Justice David Davis's election to the U.S. Senate. His replacement, John Marshall Harlan, was nominated ten days before the preliminary vote but did not take his seat until after confirmation in late November. According to the author, Harlan "corresponded from his home in Louisville [Kentucky] with Chief Justice Waite about how he would vote on some other pending cases, but there was no mention of *Hall v. Decuir*."[85]

Waite assigned the Court's opinion to himself, but aside from a concurring opinion by Justice Clifford, no dissenting votes or other opinions were forthcoming. Thus, when the case came down on January 14, 1878, the decision appeared unanimous. Even though Louisiana's statute prohibited segregation only inside the state, Waite explained that it "must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage."[86] Near the end of his volume, Beermann notes the irony in a decision[87] by the Supreme Court twelve years later after Melville W. Fuller had become Chief Justice. In this later case, the Court affirmed a decision by the Mississippi Supreme Court upholding a state statute requiring railroad companies to provide "equal but separate" accommodations for the "white and colored races"[88] on trains operating within the state. Looking back to Decuir's case, he asks, "Was there any real difference between these two statutes with respect to interstate commerce? There does not appear to be, apart from their diametrically opposite positions on integration."[89]

Justice Deferred

Both *McLaurin* and *Decuir* merit attention in **Justice Deferred** by Orville Vernon Burton and Armand Derfner.[90] The former is professor of history at Clemson University and the latter is a civil right attorney who has been counsel for the NAACP Legal Defense Fund and the Mexican American Legal Defense and Educational Fund. Their subtitle—"Race and the Supreme Court"—succinctly and accurately captures the contents of the book.

With 449 pages, references to some 430 cases, and 75 pages of extensive endnotes, **Justice Deferred** can fairly be described as hefty and comprehensive, but happily

readable. It is also a volume that is sure to be a go-to source for some years to come in that it appears to draw from and/or to comment upon the overwhelming majority of decisions by the U.S. Supreme Court that plausibly can be categorized as racial. Some of the 430 cases are well known, just as others have been rescued from obscurity. By casting such a broad net, the authors thus highlight decisions involving African Americans, indigenous peoples, Latinos, and Asians. Moreover, similar to Beermann, Burton and Derfner include a warning at the outset about word choice: "We have generally used modern terminology in the book except in direct quotations from earlier times, where readers will see the 'n-word' and other offensive epithets. We chose to leave in these terms in order to convey the often grim reality of this history."[91]

The authors and editors have enriched the narrative and analysis by reproducing thirty-five photographs or other illustrations, including (on page 161) the iconic photo of George McLaurin in the alcove at the University of Oklahoma. Adding to the book's usefulness is a dedicated website that the authors have prepared: http://justice-deferred.clemson.edu. As Burton and Derfner explain, the site "supplements the endnotes with added material on many of the cases and historical topics; it also includes links to census reports and relevant web resources."[92] While the book will appeal to those interested in Supreme Court history as well as racial justice, one hopes that the editors will ask the authors to prepare a condensed version that could be assigned as course reading for schools and colleges. That would assure **Justice Deferred** an even wider audience.

Those already well-grounded in Supreme Court history will be familiar with what seems to be the book's thesis: While Americans

> typically think of the Supreme Court as the guardian of both law and liberty... the reality is more complicated, especially in the area of race and civil rights. In this area, those accomplishments date from a short period in history, from the 1930s to the early 1970s. Before that time, the Supreme Court spent much of its history ignoring or suppressing those rights, and in the half century since the early 1970s the Court's record on civil rights has retreated far more than it has advanced.[93]

For the authors, race and the Court are at the center of drama that continues to unfold, but they insist that major roles in that drama are also played by "two other actors: Time and Law." That is, slavery and Jim Crow prevailed for 300 years and have been gone for slightly more than half a century. "If we count a generation as 25 years, then American history has consisted of twelve generations of white supremacy and barely two generations of trying, sometimes more aggressively than at other times, to overcome it." Law in turn has "always been central in maintaining racial control and separation."[94] And one must add that law—whether from the courts or the legislature—has also been a principal vehicle for change across time. Indeed, the authors look to the Thirteenth Amendment with "its promise to end the badges and incidents of slavery, root and branch, to guarantee equality and, ultimately, to end discrimination and eliminate racial prejudice." For them, the spirit of the Thirteenth Amendment is at the heart of the Constitution. "That spirit animates this book."[95] Accordingly, the reader is duly primed not to expect dispassionate analysis from Burton and Derfner, but an account that highlights when the justices have measured up to the authors' mark and when they have fallen short.

In addition to an introduction and conclusion, **Justice Deferred** consists of thirteen chapters that might have beneficially been organized into parts. Chapters one through six

form the first half of the book and reach from 1619 until 1953—that is, from the arrival of the first slaves in the colony of Virginia until just before the Court's historic ruling in *Brown v. Board of Education*. In the second half of the book, chapters seven through nine cover the Warren Court (1953–1969), and chapters ten through thirteen focus on the period 1969–2020. Within this latter half, the chapters are organized topically. For example, chapter eleven is devoted to affirmative action. Chapter thirteen—perhaps the most insightful and timely in the second half—addresses race and current issues of criminal justice and law enforcement. Beginning with a brief account of the killing of George Floyd in Minneapolis on May 24, 2020, and the event's ramifications, the chapter explores the death penalty, juries, and prisons. The chapter concludes with attention to remedies for official violation of civil rights.[96] The chapter stands as a clear demonstration of Justice Vanderbilt's point—noted at the outset of this essay—about where "citizens primarily feel the keen, cutting edge of the law."

The conflict-resolution work of the Supreme Court is both legal in nature yet unavoidably political. As **Justice Deferred** and the other books surveyed here demonstrate, the justices—sometimes subtly and sometimes unmistakably—continue to shape the nation.

Donald Grier Stephenson Jr. is Charles A. Dana Professor of Government, Emeritus, Franklin & Marshall College.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED

ALPHABETICALLY BY AUTHOR BELOW

BEERMANN, JACK M. *The Journey to Separate but Equal: Madame Decuir's Quest for Racial Justice in the Reconstruction Era* (Lawrence: University Press of Kansas, 2021). Pp. xii, 238. ISBN: 978-0-7006-3183-4 (cloth).

BURTON, ORVILLE VERNON, AND ARMAND DERFNER. *Justice Deferred: Race and the Supreme Court* (Cambridge, MA: Harvard University Press, 2021). Pp. xii, 449. ISBN: 978-0-674-97564-4 (cloth).

LEVY, DAVID W. *Breaking Down Barriers: George McLaurin and the Struggle to End Segregated Education* (Norman: University of Oklahoma Press, 2020). Pp. xii, 233. ISBN: 978-0-8061-6722-0 (paper).

SCHWARTZ, DAVID S. *The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of* McCulloch *v.* Maryland (New York: Oxford Press, 2019). Pp. xi, 328. ISBN: 978-0-19-758213-8 (paper).

ENDNOTES

[1] Arthur T. Vanderbilt, **The Challenge of Law Reform** (1955), pp. 4–5. Vanderbilt was on short list of persons President Dwight Eisenhower considered naming to the Supreme Court following the death of Chief Justice Fred Vinson in 1953. James F. Simon, **Eisenhower v. Warren** (2018), 137.

[2] This phrase was popularized by John Adams shortly before the Revolutionary War. It appears in Article XX of the Massachusetts Constitution, the oldest of the American state constitutions still in force.

[3] *Osborn v. United States*, 22 U.S. 738, 4.

[4] Speech at Elmira, New York, May 3, 1907, in Charles Evans Hughes. **Addresses of Charles Evans Hughes** (2nd ed., 1916), p. 185.

[5] Oliver Wendell Holmes Jr, "The Path of the Law," 10 *Harvard Law Review* 457, 477 (1897).

[6] Felix Frankfurter, **Mr. Justice Holmes and the Supreme Court** (1939), p. 9.

[7] Alexis de Tocqueville, **Democracy in America**, J. P. Mayer, ed. (1969), pp. 149–150.

[8] 347 U.S. 183 (1954).

[9] 410 U.S. 113 (1973).

[10] Perception of the Court as overtly partisan may account for what a Quinnipiac University poll reported on September 15, 2021. Among registered voters, the Supreme Court received a negative 37–50 percent job approval rating, with 13 percent not offering an opinion. This was the most negative job approval since Quinnipiac University began asking the question in 2004, and a noticeable drop from July 2020, when registered voters approved 52–37 percent. https://poll.qu.edu/poll-release?releaseid=3820. Last accessed September 29, 2021.

[11] 17 U.S. (4 Wheaton) 316 (1819).

[12] David S. Schwartz, **The Spirit of the Constitution** (2021), hereafter Schwartz.
[13] *Id.*, p. ix.
[14] 567 U.S. 519 (2012).
[15] Schwartz, p. 1.
[16] 17 U.S. at 421, emphasis added.
[17] 17 U.S. 407, emphasis in the original.
[18] Schwartz, p. 2, italics in the original.
[19] *Id.*, p. 4
[20] *Id.*, p. 3.
[21] Hamilton's opinion on the Bank is included among the documents of Yale Law School's Avalon Project and is accessible online: https://avalon.law.yale.edu/18th_century/bank-ah.asp, last accessed on October 14, 2021.
[22] Schwartz, p. 254.
[23] *Id.*, p. 3.
[24] *Id.*, pp. 257–258.
[25] *Id.*, p. 259.
[26] Charles Warren, **The Supreme Court in United States History**, rev. ed. (1926), vol. 1, p. 511.
[27] Readers not already familiar with Warren's *History* should know that one of its strengths, especially in volume one, is the author's heavy reliance on newspaper and pamphlet commentary with respect to the Court's decisions.
[28] Donald O. Dewey, **Marshall v. Jefferson: The Political Background of *Marbury* v. *Madison*** (1970), p. 175.
[29] As the author writes in the Preface, "Certain portions of the book have appeared in earlier and different forms" in three law journals which he lists. Schwartz, p. xi.
[30] *Id.*, p. 5.
[31] 22 U.S. (9 Wheaton) 1 (1824).
[32] *Id.*, at 194.
[33] *Id.*, at 196.
[34] The commerce power is "the most important substance power vested in the Federal Government in time of peace. . .." Bernard Schwartz, **A History of the Supreme Court** (1993), p. 47.
[35] Schwartz, pp. 1–2.
[36] *Id.*, p. 80, emphasis in the original.
[37] *Id.*, p. 94. For Schwartz, the occasion was *New York* v. *Miln*, 36 U.S. (11 Peters) 102 (1837).
[38] *Id.*, p. 5.
[39] *Id.*, p. 6.
[40] *Id.*, pp. 253–254.
[41] *Ibid.*, 6.
[42] *Id.*, 255.
[43] David W. Levy, **Breaking Down Barriers** (2020), hereafter Levy.
[44] 339 U.S. 637 (1950.
[45] 163 U.S. 537 (1896).
[46] Levy, 3.
[47] *Ibid.*, 5.
[48] *Id.*, 61.
[49] Levy explains that "Marshall may have had an interest in exaggerating McLaurin's age in order to render absurd the racist claim that black men wanted to enter white colleges only so that they could hunt for white women." *Id.*, 61, n. 2.
[50] *Id.*, 9.
[51] Given the publication date of Levy's book, there is of course no mention of the Supreme Court's decision in *McGirt* v. *Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020), on the respective authorities of the state of Oklahoma and tribal governments.
[52] Levy, 15.
[53] *Ibid.*, 17.
[54] *Id.*, 28.
[55] 305 U.S. 337 (1938).
[56] *Id.*, at 349.
[57] 332 U.S. 631 (1948). The delay seems attributed to a combination of the exigencies created by World War II, stretched legal resources, and of course the availability of an appropriate plaintiff.
[58] *McLaurin v. Oklahoma State Regents for Higher Education*, 87 F. Supp. 526 (W.D. Okla. 1948).
[59] Levy, 79.
[60] *McLaurin v. Oklahoma State Regents for Higher Education*, 87 F. Supp. at 528.
[61] Levy, 79.
[62] *Ibid.*, 86.
[63] *Id.*, 86–87.
[64] *Id.*, 98.
[65] *Id.*, 99.
[66] 339 U.S. 629 (1950).
[67] Levy, 187.
[68] 339 U.S. at 641.
[69] Levy, 205–206.
[70] McLaurin moved to California from Oklahoma to live with a son after his wife Penninah died in 1996.
[71] *Ibid.*, 29.
[72] 95 U.S. 485 (1878).
[73] Jack M. Beermann, **The Journey to Separate but Equal** (2021), hereafter Beermann.
[74] *Ibid.*, 1.
[75] 394 U.S. 618, 629 (1969).
[76] Beermann, 1.
[77] In Bardolph's book, see pp. 62–63 in particular.
[78] Beermann, 1.
[79] C. Vann Woodward, **The Strange Career of Jim Crow**, 2nd rev. ed. (1966), 25.
[80] Beermann, 10.
[81] *Ibid.*, 11.
[82] *Id.*, p. 58.
[83] *Decuir v. Benson*, 27 La. Ann 1 (1874).
[84] Beermann, pp. 142 and 133.
[85] *Id.*, p. 141.
[86] 95 U.S. at 489.

[87] *Louisville, New Orleans, and Texas Railway v. Mississippi*, 133 U.S. 587 (1890).
[88] Beermann, p. 164.
[89] *Id.*, p. 165.
[90] Orville Vernon Burton and Armand Derfner, **Justice Deferred** (2021).
[91] *Id.*, p. ix.
[92] *Id.*
[93] *Id.*, p. 1.
[94] *Id.*, p. 2.
[95] *Id.*, p. 3.
[96] *Id.*, pp. 320–337.

Contributors

Paul Kens is a professor at Texas State University.

Gerard N. Magliocca is Samuel R. Rosen Professor, Indiana University Robert H. McKinney School of Law.

Olivia O'Hea wrote this article as a third-year J.D. Candidate at Georgetown University Law Center.

Todd C. Peppers holds the Fowler Chair in Public Affairs at Roanoke College and is also a visiting professor of law at the Washington and Lee School of Law.

Donald Grier Stephenson. Jr. is Charles A. Dana Professor of Government, Emeritus, Franklin & Marshall College.

Terence Walz is an independent historian.

DOI: 10.1111/jsch.12289

Illustrations

Page 8, Portrait by Henry Benbridge, 1783. Courtesy of Mount Vernon.

Page 10, N.W. view of Mount Vernon. Lithograph by P. Haas, Library of Congress.

Page 11, Portrait by Chester Harding, National Portrait Gallery, Smithsonian Institution; gift of the Washington family.

Page 13, Samuel F. B. Morse, painter, Corcoran Collection.

Page 14, Portrait by Gilbert Stuart, Library of Congress.

Page 21, Google maps.

Page 23 (top), Library of Congress.

Page 23 (bottom), Photograph by Frances B. Johnston, 1899. Library of Congress.

Page 24, Photograph by Clinedinst, 1910, Library of Congress.

Page 25, Sketch in *Leslie's Illustrated Weekly*, 1894.

Page 28, Courtesy Capitol Page School.

Page 29, Unknown photographer. Photograph courtesy of the Bush family.

Pages 31, 32, Photographs donated by Stuart Polly to the Collection of the Supreme Court of the United States.

Page 34, 36, *Yearbook* of the 1957 Capitol Page School.

Pages 40, 41, Photographs courtesy of the Bush family.

Page 44, U.S. House of Representatives.

Page 46, photograph by Yoichi Okamoto, LBJ Library.

Pages 48, 49, AP Wire Photo.

Page 51, Collection of the Supreme Court of the United States.

Page 55, file photo.

Page 58, Collection of the Supreme Court of the United States.

Page 65, photograph by Mathew Brady or Levin Handy, Brady-Handy Photograph Collection (Library of Congress).

Photograph by Fred Schilling, Collection of the Supreme Court of the United States.

DOI: 10.1111/jsch.12290